Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

THE MONTGOMERY COUNTY PUBLIC SCHOOLS AND MEMBERS OF THE MONTGOMERY COUNTY BOARD OF EDUCATION,

Petitioners,

v.

JEFFREY EISENBERG AND ELINOR MERBERG, ON BEHALF OF JACOB EISENBERG,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, contrary to the rulings in, *e.g.*, *Washington* v. *Seattle School Dist. No. 1*, 458 U.S. 457 (1982) and *McDaniel* v. *Barresi*, 402 U.S. 39 (1971), as well as opinions of several courts of appeals, the court below erred in ruling that the Equal Protection Clause of the Fourteenth Amendment proscribes all voluntary action by public school authorities limiting student assignments or student transfers in order to avoid creating racially isolated schools, if a student's race is considered for that purpose.

2. Whether the constitutional prohibition of consideration of race in the student assignment context as identified by the Fourth Circuit is so clear that a court of appeals can determine the outcome of the strict scrutiny inquiry without development of a factual record or fact finding by the trial court concerning the existence of compelling state interests or the narrow tailoring requirement.

PARTIES TO THE PROCEEDING

Petitioners, defendants below, are the Montgomery County, Maryland, Public Schools and members of the Montgomery County Board of Education. The current members of the Montgomery County Board of Education are Patricia O'Neill, President; Kermit V. Burnett, Vice President; Stephen N. Abrams; Reginald M. Felton; Beatrice B. Gordon; Nancy J. King; Mona M. Signer; and Laura Sampedro, Student Member. The Complaint named then–Superintendent of Schools, Dr. Paul Vance, as a defendant in his official capacity. The current Superintendent of Schools is Dr. Jerry D. Weast.

Respondents, plaintiffs below, are Jeffrey Eisenberg and Elinor Merberg, on behalf of Jacob Eisenberg.

All parties are either individuals or governmental entities with no parent companies or nonwholly owned subsidiaries to be disclosed pursuant to Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

The Montgomery County, Maryland, Public Schools and members of the Montgomery County Board of Education petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on October 6, 1999.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (App. 1a-20a) is reported at _ F.3d _ (1999 WL 795652). That opinion reversed a decision of the District Court for the District of Maryland (App. 21a-30a), which is reported at 19 F. Supp. 2d 449.

JURISDICTION

The Court of Appeals for the Fourth Circuit issued its opinion and mandate and entered its judgment on October 6, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

INTRODUCTION

This case presents the Court with the question whether consideration of race in the assignment of students to public schools violates students' rights to the Equal Protection of the laws, even where necessary to avoid creating racially isolated schools or to provide racially and ethnically diverse schooling, which local officials have concluded is an important educational benefit for children. The Fourth Circuit's decision in this case imposes a bright-line rule that race cannot be considered in assignments of individual students because, in its view, even the limitation of transfers away from "neighborhood schools" to avoid racial isolation constitutes proscribed "racial balancing." Intervention by this Court is necessary because the Fourth Circuit's decision conflicts with decisions of this Court and cases in other courts of appeals establishing that local school officials have power to correct or avoid racial segregation. The severity of the Fourth Circuit's legal holding is demonstrated by the fact

that it entered final judgment on a preliminary injunction record, failing to analyze all the facts carefully, as this Court's cases require when applying strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. The decision below follows a trend of federal court decisions striking down local voluntary public school student assignment programs designed to avoid racial isolation. This decision leaves school officials nationwide in further uncertainty and at legal risk in a basic and important area of school district operation of fundamental public importance. This Court should grant certiorari to resolve this growing conflict on an important issue of federal law.

STATEMENT OF THE CASE

A. The Transfer Request at Issue

The Montgomery County, Maryland, Public Schools ("MCPS" or the "District") has responsibility for educating over 125,000 children enrolled at 183 schools. App. 22a.[1] Students in the District generally are assigned to school based on their residence, through attendance area boundaries established for elementary, middle and high schools. App. 33a. MCPS makes exceptions to attendance area assignments for special assignment processes, such as special education placement or parental requests for student transfers. One purpose of student transfers is to permit attendance at MCPS magnet programs, which have a specialized curriculum focus or method of instruction. App. 33a. MCPS developed magnet school programs and the transfer policy, under the leadership of its elected Board of Education, with the educational goal of allowing parental choice among public schools and programs without creating racial isolation in schools. App. 39a. The MCPS Board of Education has concluded that racially isolated schools limit students' later ability to function successfully in interracial

[1] All school data in the Statement, unless otherwise indicated, is as of July 1998, prior to the preliminary injunction hearing. App. 35a.

settings and fail to prepare children adequately for the future. App. 40a.[2]

The transfer policy was the successor to policies adopted by MCPS as part of an agreement with the Office for Civil Rights of the United States Department of Education. App. 36a. The Office for Civil Rights investigated student transfers due to a parent complaint in 1980 that MCPS was causing resegregation by approving transfers of white students that increased minority enrollment proportions at sending schools. App. 36a.

For the 1998-99 school year, MCPS received approximately 3,500 transfer applications, the majority of which it granted. App. 35a. Jeffrey Eisenberg and Elinor Merberg applied to MCPS for a transfer of their son, Jacob Eisenberg, from Glen Haven Elementary School to Rosemary Hills Elementary School, which provides a math and science magnet program. App. 39a. The family's home is within a few blocks of Glen Haven, to which Jacob Eisenberg was assigned for first grade for 1998-99 pursuant to the MCPS attendance area policy. App. 33a.

As MCPS considered transfer applications for 1998-99, it had before it the following racial and ethnic composition information for 1997-98 (App. 35a-36a):

White	African American	Hispanic	Asian
	Glen Haven		
24.1%	40.5%	25%	10.1%
	Rosemary Hills		
66%	15.9%	13.8%	4.1%

Jacob Eisenberg was one of 19 white students—roughly the equivalent of a full classroom of white students—who

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[2] MCPS, like all Maryland school districts, was racially segregated by law before *Brown* v. *Board of Education,* 347 U.S. 483 (1954). App. 36a. MCPS has never been the subject of school desegregation litigation; it has addressed racial isolation voluntarily. App. 36a, 39a.

applied for a transfer out of Glen Haven for the 1998-99 school year. App. 36a. The 19 students represented about 14% of Glen Haven's white students.

Pursuant to its established policy, MCPS considered each transfer request, including Jacob Eisenberg's, to determine whether: 1) school building space considerations at the sending and receiving schools supported the transfer; 2) the transfer would adversely affect the size of enrollment at the sending or receiving school; 3) boundary changes or other factors affecting school stability were imminent at either school; and 4) the transfer would have an adverse impact on racial or ethnic diversity at either school. App. 33a-34a. MCPS grants requests based on a verified personal hardship, overriding all other considerations including the impact on racial or ethnic diversity. App. 34a.

MCPS considers the race of a student seeking a transfer only if the proposed transfer would contribute to racial isolation at either the sending or receiving school. App. 34a. MCPS examines the racial and ethnic composition of each of its schools, and the history of enrollment over time, before beginning the transfer process. App. 34a. For Glen Haven, MCPS data showed not only that white enrollment was less than half of the District-wide white enrollment,[3] but that Glen Haven's white enrollment had dropped from 38.9% in 1994-95 to 24.1% in 1997-98, a decline averaging almost five percentage points per year. App. 35. It is only where the enrollment of a racial or ethnic group is substantially different (by more than 1.5 standard deviations) from the District-wide enrollment for that racial or ethnic group *and* the enrollment for the group at the school has moved for several years away from the District average, that race or ethnicity is considered at all for transfers to or from that school. App. 34a.

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[3] The District's overall racial composition for 1997-98 was (App. 35a):

White	African American	Hispanic	Asian
53.4%	20.3%	13.2%	12.7%

As a result, for most MCPS schools, race is not a factor at all in considering transfers. App. 34a. MCPS does not limit its consideration of race to white students. App. 34a. Because a transfer could contribute to isolation of different racial or ethnic groups depending on the racial composition of the sending and receiving schools, students of any race or ethnic group may be denied a transfer depending on a variety of factors including diversity, absent any hardship. App. 34a.

No personal hardship was offered in support of Jacob Eisenberg's transfer application. App. 36a. MCPS denied Jacob Eisenberg's request to transfer to Rosemary Hills because the transfer would contribute to increasing racial isolation at Glen Haven. App. 36a. For the 1998-99 school year, MCPS denied the requests of 14 of the 19 white students seeking transfers out of Glen Haven; MCPS granted five of the requests because it verified a stated personal hardship. App. 36a. MCPS also denied requests to transfer from Glen Haven of three African-American students and one Hispanic student, because of conditions at the requested receiving schools.[4]

B. The Complaint and Motion for Preliminary Injunction

On August 14, 1998, Jeffrey Eisenberg and Elinor Merberg filed a Complaint on behalf of Jacob Eisenberg in the United States District Court for the District of Maryland, alleging that MCPS denied the transfer request on grounds of Jacob Eisenberg's race, in violation of his "rights under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution and 42 U.S.C. 2000d." Jurisdiction was invoked pursuant to 28 U.S.C. § 1331. The Complaint sought an order requiring MCPS "to admit Jacob Eisenberg before the beginning of the school year to first grade at Rosemary Hills"; an order prospectively prohibiting MCPS "from barring any person on the basis of race from

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[4] *See* Memorandum to Members of the Board of Education from Paul L. Vance (Aug. 19, 1998), at 210 in the Joint Appendix submitted to the United States Court of Appeals for the Fourth Circuit.

competing for any transfer available through the school system"; compensatory damages in the amount of $20,000 and punitive damages in the amount of $100,000, along with attorneys' fees and costs.

With the Complaint, Mr. Eisenberg and Ms. Merberg filed a Motion for a Temporary Restraining Order and/or Preliminary Injunction. App. 23a. The Motion sought only "an immediate order from the court requiring defendants to enroll Jacob Eisenberg in Rosemary Hills Elementary School prior to August 31, 1998, the commencement of the school year."[5] Plaintiffs requested "an immediate hearing" "to ensure that defendants' violation does not prevent Jacob from starting the school year at Rosemary Hills together with all other first year students."[6] The requested relief would not harm MCPS, plaintiffs contended, because the transfer involved only "one white student" and "would not cause defendants to do anything differently with respect to their administration of admissions to county schools then [*sic*] they have been doing through the years."[7]

MCPS filed a brief in opposition, supported by affidavits of the MCPS administrators with responsibility for transfers and for curriculum and instruction. App. 32a-40a. MCPS also demonstrated that the Maryland State Board of Education, the highest education authority in the State, had upheld the transfer policy in five administrative appeals brought by individual students denied transfers on grounds that the transfers would contribute to racial isolation,[8] and that the Office for Civil Rights of the United States Department of Education in 1996 had rejected a parent complaint that the

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[5] Motion for a Temporary Restraining Order and or Preliminary Injunction (Aug. 14, 1998) at 1.

[6] Memorandum in Support of Motion for a Temporary Restraining Order and or Preliminary Injunction (Aug. 14, 1998) at 3-4.

[7] *Id.* at 5.

[8] Defendants' Opposition to Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction (Aug. 21, 1998) at Exs. D-H.

transfer policy discriminates on the basis of race in violation of Title VI.[9]

Seven days after plaintiffs filed the motion, on August 21, 1998, the district court held the requested hearing. No party sought consolidation of the preliminary injunction hearing with trial on the merits. *See* Fed. R. Civ. P. 65(a)(2). The parties did not present testimony at the hearing. When asked by the court if he wanted to call witnesses, Mr. Eisenberg, representing the plaintiffs, said:

> We are not really here bringing some sort of broad challenge to the entire transfer policy or to other policies in Montgomery County. What we're really talking about here is the treatment that Jacob's application received at the hands of defendants. So, we're really only alleging that his . . . civil rights were violated, not some sort of broad attacks against the constitutionality of the transfer policy generally.[10]

When the court asked MCPS if it wished to submit evidence, it replied: "*[F]or purposes of the preliminary injunction*, we have attached affidavits . . . and we would submit on those."[11]

All parties agreed that strict scrutiny should be applied to the MCPS decision to deny the transfer.[12] The crux of Mr. Eisenberg's argument was that "the only compelling interest the government could ever have to use a racial classification is if it is to remedy a history of race discrimination and to remedy specific injuries caused by that discrimination . . . ."[13] Mr. Eisenberg "accept[ed] that the school

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9 *Id.* at Ex I.

10 Transcript of Motions Hearing (Aug. 21, 1998) at 5.

11 *Id.* at 34 (emphasis added).

12 *Id.* at 8-9, 23.

13 *Id.* at 9.

district has a legitimate interest in trying to promote the stability of its different schools . . . ."[14]

The district court denied the request for a temporary restraining order from the bench, because such relief would last for only 10 days and did not appear to be warranted.[15] The court took the preliminary injunction motion under advisement, but asked for immediate notice when the Board of Education acted on an appeal of the transfer denial, which the Board was to hear on August 26.[16]

MCPS notified the district court on August 27, 1998, that the Board of Education had denied the appeal of the transfer request.[17] It further informed the district court that Jacob Eisenberg's parents had declined a transfer from Glen Haven to a foreign language immersion program at Rock Creek Forest Elementary School. MCPS had offered the transfer when a vacancy at Rock Creek Forest developed on August 25 and Jacob Eisenberg's name came to the top of the waiting list. MCPS offered the Rock Creek Forest transfer, although it denied the transfer to Rosemary Hills, because it conducts a lottery for admission to the Rock Creek Forest program without consideration of the usual transfer factors such as diversity.[18]

C. The District Court Decision

On September 4, 1998, the district court denied the motion for preliminary injunction. App. 21a-31a. Under the Fourth

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[14] *Id.* at 29.

[15] *Id.* at 32-33.

[16] *Id.* at 33.

[17] *See* Supplement to Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction (Aug. 27, 1998) at 2.

[18] MCPS makes this exception to the transfer policy because of the small size of the language immersion program and the lack of any comparable program in regular attendance area schools, in contrast to the math and science program at Rosemary Hills, which is focused on subjects that are an integral part of the MCPS curriculum in every school.

Circuit's test for preliminary relief, *see Manning* v. *Hunt,* 119 F.3d 254, 263 (4th Cir. 1997), the court first considered the balance of hardships. The district court agreed with plaintiffs that violation of Jacob Eisenberg's constitutional rights is per se irreparable harm. The harm was slight, however, because he would be able to receive an education "very comparable" to Rosemary Hills at Glen Haven. App. 24a.[19] The court found the potential harm to the District, in contrast, to be "substantial," because relief for Jacob Eisenberg could lead to the grant of transfers for other similarly situated students, possibly compromising the effort to avoid "racial isolation among certain schools in the District [which] is appropriately of paramount concern to the District . . . ." App. 24a. Because the balance of hardships "slightly favors the District," the district court concluded that, to prevail, plaintiffs had to make a strong showing that they likely would succeed on the merits. *Id.*

In considering whether "the District can take race into account in deciding whether to approve voluntary transfer requests," the court subjected the transfer decision to "exacting scrutiny." App. 24a-25a. The court held that "[a] challenged policy or decision can survive such 'strict scrutiny' review only if it is justified by a 'compelling governmental interest' and is 'narrowly tailored' to accomplish that goal. *Richmond* v. *Croson,* 488 U.S. 469, 493 (1989) (plurality opinion)." *Id.* Two interests of the District were found sufficiently compelling to support the consideration of race in the transfer process: "promotion of a diverse student population" and "avoiding the creation, through District action, of segregative enrollment patterns that might themselves constitute violations of the law." App. 25a. If the District chooses to allow transfers, the court concluded that it "must of course do so without facilitating through its actions private conduct that leads to a

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[19] The evidence before the court showed that while Rosemary Hills offers a science and math magnet program, Glen Haven provides the same basic curriculum with a special intensive reading program. App. 40a.

discriminatory environment." App. 27a-28a, citing *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971); *Norwood* v. *Harrison,* 413 U.S. 455, 465 (1973) ("[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish").

The court concluded that MCPS' consideration of race in the transfer process is likely "narrowly tailored" to achieve these goals. App. 28a. The "policy does not single out whites, African-Americans, or other minorities," but restricts transfers of whites out of some schools and African-Americans out of others. *Id.* "At a substantial number of schools, transfers are approved without consideration of the impact on race or ethnic makeup of the affected schools." *Id.* The court further found that "the policy is not rigidly applied – transfers out of a school are permitted" in the case of great need or hardship, *id.*, and MCPS reviews the transfer policy periodically and updates its data on each school annually. App. 29a. Because "the purpose of the plan is to ensure racial and ethnic diversity of the schools of the County, the [c]ourt cannot conceive of, and Eisenberg does not suggest, any race-neutral alternative to the policy." *Id.* The court further found that the denial of a preliminary injunction was in the public interest. App. 30a.

The court cautioned that the ruling on the narrow-tailoring issue was not a final resolution because evidence of the impact of the policy District-wide was not before it:

> The ultimate question of whether the program is sufficiently narrowly tailored to survive constitutional scrutiny should obviously await further factual development as to how the policy has, in fact, been implemented. [App. 30a.]

Plaintiffs noticed an appeal of the denial of the preliminary injunction, pursuant to 28 U.S.C. § 1292(a)(1).

D. The Fourth Circuit Decision

On October 6, 1999, a Fourth Circuit panel reversed. App. 1a-20. The court not only directed the entry of a preliminary injunction requiring MCPS to admit Jacob Eisenberg to Rosemary Hills, but—despite the fact that the appeal was of an interlocutory order pursuant to 28 U.S.C. § 1292(a)(1) and there had been no evidentiary proceeding or consolidation of the injunction proceedings with the merits by the district court—also finally disposed of the case, directing entry of a "final injunction requiring the school authorities in Montgomery County to reconsider the application of Jacob [Eisenberg] to transfer to the Rosemary Hills Elementary School magnet program without consideration of his race." App. 19a.

While the Fourth Circuit agreed with the district court that strict scrutiny analysis should be applied to the transfer program, it faulted the district court for failing "to adhere to . . . the presumption against race based classifications," App. 9a, and concluded that "*[t]here is nothing in the record to overcome this presumption.*" App. 10a (emphasis in original). The district court erred, the appellate panel concluded, in its analysis of whether the plaintiffs were likely to succeed on the merits "given that the record demonstrates that Montgomery County's transfer policy is not a remedial race-conscious policy." App. 11a. The court allowed that "race based classifications have been tolerated in situations where past constitutional violations require race based remedial action" but it did "not face that type of scenario in this case." App. 12a.

The court characterized the District's interests in diversity and in avoiding racial isolation as "one and the same." App. 12a. While the court acknowledged that it was "tempting to decide the general question of whether or not diversity is a compelling governmental interest," it claimed that it "resisted[ed] that temptation," "[h]owever persuasive the arguments, and however tantalizing the facts of this case are," because resolution of the issue was not essential to its decision. App. 15a n.20.

Instead, the court struck down "Montgomery County's use of racial classifications in its transfer decisions" as not narrowly tailored to the interest of obtaining diversity. App. 14a. The court felt compelled to "find" that the policy "is mere racial balancing in a pure form . . . ." App. 15a. The court characterized MCPS' annual review of the data concerning each school, and whether attention to race in transfers involving that school continued to be appropriate, as "Montgomery County's attempt to regulate transfer spots to achieve the racial balance or makeup that most closely reflects the percentage of the various races in the county's public school population." App. 17a. Exceptions for personal hardship do not "limit or narrow the transfer policy so that racial balancing is suddenly a narrow fit to achieve diversity." *Id.* While the court recognized that race or ethnic background is not the only factor MCPS considers in deciding transfer requests, "in Jacob [Eisenberg]'s situation, his race was the only factor that led to the denial of his request." *Id.* "It does not matter," opined the court, "that, as the County argues, 'at some schools, African-Americans are generally not allowed to transfer out' and that 'the policy does not single out whites, African-Americans or other minorities,'" because "a denial of transfer to African-Americans or other minorities on account of their race is no less unconstitutional than the denial to Jacob was here." App. 18a.

In summarizing its holding, the court reiterated that the transfer policy "is engaging in racial balancing," which the court previously had "held to be unconstitutional." App. 19a, citing *Tuttle* v. *Arlington County School Board*, 1999 WL 986773 (4th Cir. Nov. 1, 1999). "Added to the racial balancing is the fact that Jacob's transfer request was refused because of his race," a type of governmental action "presumed to be invalid and . . . subject to strict scrutiny." *Id.* The court ruled that "[n]othing in the record overcomes that presumption." *Id.*

Finally, the court concluded that it was "justified in requiring the entry of an injunction finally disposing of this

case without an evidentiary hearing because the record clearly establishes the plaintiff's right to an injunction and such a hearing would not have altered the result." App. 20a.[20] The court, *sua sponte,* issued its mandate along with its decision.[21]

REASONS FOR GRANTING THE WRIT

Whether a school district voluntarily can consider the race of students where necessary to avoid creating racial isolation raises "an important federal question" that should be definitively resolved by this Court. Sup. Ct. R. 10(a). MCPS, along with the other 433 school districts in the Fourth Circuit, is caught between this Court's teachings that school districts may take voluntary, race-conscious action to avoid creating racial isolation, s*ee, e.g.*, *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 474 (1982); *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 45 (1971), citing *Swann,* 402 U.S. at 16, and the Fourth Circuit's *per se* rule that a school district may not make enrollment decisions for individual students with any reference to race without transgressing a constitutional proscription of "racial balancing."

The Fourth Circuit's ruling is in conflict with decisions of other courts of appeals that permit school districts to take

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[20] After oral argument in the court of appeals, Mr. Eisenberg and Ms. Merberg had filed a motion in the district court seeking retroactive consolidation of the preliminary injunction hearing, held 10 months earlier, with trial on the merits. The district court denied the motion, because "[t]he issues in this case are too great and too significant to the citizens and school officials in Montgomery County for this Court to expedite the entire case and, in effect, trivialize the importance of this case." *Eisenberg* v. *Montgomery County Public Schools,* Memorandum Opinion at 2 (D. Md. July 14, 1999).

[21] During the pendency of plaintiffs' appeal of the denial of the preliminary injunction, district court litigation proceeded. All claims for damages had been dismissed or withdrawn in the district court by the time of the Fourth Circuit's ruling. On remand, the district court entered the preliminary and final injunction order on December 3, 1999, App. 41a, which resolved the only remaining claims.

voluntary action to promote racial and ethnic diversity in classrooms. *See, e.g., Hunter ex rel. Brandt* v. *Regents of Univ. of Cal.*, 190 F.3d 1061 (9th Cir. 1999), *petition for reh'g pending*; *Parents Ass'n of Andrew Jackson High Sch.* v. *Ambach*, 738 F.2d 574 (2d Cir. 1984). The decision also exacerbates a growing disarray among the courts of appeals about the methodology for analyzing governmental actions that overtly consider race. Like the Fifth Circuit in *Hopwood* v. *Texas*, 78 F.3d 932 (5th Cir.), *reh'g en banc denied*, 84 F.3d 720 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), the Fourth Circuit has carved out a category of race-conscious governmental action in education and created a bright-line rule that it is unconstitutional. This approach cannot be reconciled with this Court's recent strict scrutiny cases, which emphasize the careful fact finding that must underpin the analysis of a governmental practice that takes race or ethnicity into account.

The lower federal courts need this Court's guidance concerning the extent to which State and local judgment is constrained in assigning children to public schools, an issue of importance to nearly 15,000 public school districts nationwide and the millions of families they serve.

A. The Fourth Circuit's Decision Effectively Outlawing Consideration of Race in School Assignments Conflicts With Decisions of Both This Court and Other Courts of Appeals.

In 1971, the unanimous Court stated that because "school authorities have wide discretion in formulating school policy, . . . as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." *North Carolina State Bd. of Educ.*, 402 U.S. at 45, citing *Swann*, 402 U.S. at 16.[22] *See also Columbus Bd.*

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[22] The *Swann* cases applied in the public school context the principle "recognizing the States' ability to take voluntary race-conscious action to achieve compliance with the law even in the absence of a specific finding of past discrimination." *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring in part and concurring in the

of Educ. v. *Penick*, 443 U.S. 449, 488 (1979) (Powell, J., dissenting) ("constructive actions" such as magnet schools and encouraging transfers to achieve classroom diversity are "always open to school authorities"); *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 311-12 (Powell, J., announcing the judgment) (1978) (attaining a diverse student body "clearly is a constitutionally permissible goal for an institution of higher education").

Washington v. *Seattle School District No. 1*, 458 U.S. 457 (1982), underscores that school districts may act on a purely voluntary basis to redress or avoid racial segregation. This Court struck down an initiative adopted by Washington voters that would prohibit a desegregation plan of the Seattle Public Schools, which had never been the subject of a federal or State mandate to desegregate. *Id.* at 460. The initiative violated the Fourteenth Amendment because it placed "substantial and unique burdens" on the efforts of minorities to seek schooling for their children in racially integrated settings. *Id.* at 470. *Accord, McDaniel* v. *Barresi*, 402 U.S. 39 (1971) (reversing State court injunction prohibiting implementation of voluntary program to desegregate public schools); *Lee* v. *Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970) (New York statute prohibiting State education officials and appointed school boards from seeking "equality in attendance" by race in schools is denial of Equal Protection), *aff'd*, 402 U.S. 935 (1971). In *Crawford* v. *Board of Educ. of City of Los Angeles*, 458 U.S. 527, 535 (1982), the Court upheld a similar State law, in part because school districts retained their State-law obligation and power to desegregate.[23]

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judgment), citing *United Jewish Orgs. of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144, 165-66 (1977) (reapportionment); *McDaniel* v. *Barresi*, 402 U.S. 39 (1971) (school desegregation).

[23] These holdings are consistent with the long-standing efforts of Congress to achieve the national goal of elimination, reduction, or prevention of minority group isolation in elementary and secondary schools. *See* 42 U.S.C. § 2000d-6(a) (declaring as "policy of the United States" that the guidelines and criteria of the Civil Rights Act of 1964 "shall be applied uniformly in all regions of the United States" to

Bustop, Inc. v. *Board of Educ. of City of Los Angeles*, 439 U.S. 1380 (Rehnquist, Circuit Justice 1978), characterized as "novel" the arguments—made by parents trying to stop State court desegregation of the Los Angeles Public Schools—that "each citizen of a State who is either a parent or a schoolchild has a 'federal right' to be 'free from racial quotas and to be free from extensive pupil transportation that destroys fundamental rights of liberty and privacy.'" 439 U.S. at 1383. A wider range of desegregation can be undertaken under State authority, the opinion concluded, than can be required by federal courts:

> While I have the gravest doubts that the Supreme Court of California was *required* by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action. [439 U.S. at 1383 (emphases in original).]

Justice Powell denied a reapplication for the stay, for the reasons stated by then-Justice Rehnquist. *Bustop, Inc.* v. *Board of Educ. of City of Los Angeles*, 439 U.S. 1384 (1978).

Like other school districts around the country,[24] MCPS undertook race-conscious student assignment solutions,

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"segregation by race, whether de jure or de facto" and "whatever the origin or cause of such segregation"). Congress articulated a closely related goal in the Emergency School Aid Act ("ESAA"), which provided financial assistance from 1975 to 1981 "to meet the special needs incident to the elimination of minority group segregation" and "to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools . . . ." 20 U.S.C., § 1601(b). (ESAA later was recodified at 20 U.S.C. § 3191 *et seq.* (1978).) Congress reaffirmed that purpose in its current program to combat racial isolation in public schools, the Magnet Schools Assistance Program, first adopted in 1988 and amended in 1994. 20 U.S.C. § 7201, *et seq.* *See Board of Educ. of City of New York* v. *Harris*, 444 U.S. 130, 141 (1979) (Congress "intended the limited funds it made available to serve as an enticement device to encourage voluntary elimination of [de facto as well as de jure] segregation").

[24] *See Offermann* v. *Nitkowski*, 378 F.2d 22, 24-25 (2d Cir. 1967) (upholding dismissal of challenge to Buffalo, New York school desegregation plan to correct de facto segregation); *Martin* v.

including creating magnet schools and reviewing transfer requests to determine if they would contribute to racial isolation, with the understanding that such conduct was permitted and, in some circumstances, may be required. Granting student transfers that create or exacerbate racial isolation invites legal challenges alleging intentional racial segregation in violation of Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment. *See, e.g., Diaz* v. *San Jose Unified Sch. Dist.,* 733 F.2d 660, 670-71 (9th Cir. 1984) (departure from neighborhood school policy that permitted Anglo students to transfer to predominantly Anglo schools permitted inference of segregative intent); *Reed* v. *Rhodes*, 607 F.2d 714, 733-34 (6th Cir. 1979) (segregative intent inferred from, *inter alia*, district's actions in permitting transfers that had the "predictable result" of facilitating "student choices which would create or intensify racial segregation"), *cert. denied*, 445 U.S. 935 (1980); *NAACP* v. *Lansing Bd. of Educ.*, 559 F.2d 1042, 1051 (6th Cir.) ("[w]here the foreseeable and actual result of a transfer policy is to increase the racial identifiability of schools with large minority enrollment, continuation of the policy gives rise to a presumption of segregative intent"), *cert. denied*, 434 U.S. 997 (1977); *Keyes* v. *School Dist. No. 1*, 445 F.2d 990, 1001 (10th Cir. 1971) (segregative intent established in part by fact that "Anglo students were permitted to transfer to predominantly Anglo schools"), *cert. denied in relevant part, decision modified in part on other grounds,* 413 U.S. 189, 195 (1973).

The Fourth Circuit decision ignores these competing constitutional duties and puts school districts in the untenable

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Philadelphia Sch. Dist., 1995 WL 564344 (E.D. Pa. Sept. 21, 1995) (upholding race-conscious denial of student transfer); *Willan* v. *Menomonee Falls Sch. Bd.*, 658 F. Supp. 1416 (E.D. Wis. 1987) (upholding denial of student transfer in Wisconsin voluntary integrative interdistrict transfer program). *Accord, Jacobson* v. *Cincinnati Bd. of Educ.*, 961 F.2d 100 (6th Cir.) (upholding teacher assignment process to achieve proportions of teachers by race in each school), *cert. denied*, 506 U.S. 830 (1992); *Kromnick* v. *School Dist. of Philadelphia*, 739 F.2d 894, 903 (3d Cir. 1984) (same), *cert. denied*, 469 U.S. 1107 (1985).

position of contributing to racial isolation. This is far from a hypothetical concern in MCPS. The predecessor to the transfer policy at issue here was adopted to resolve a parent complaint with the Office for Civil Rights that MCPS was "resegregating" by allowing transfers of students without taking account of their race. Indeed, MCPS avoided school desegregation litigation by voluntarily adopting policies to meet such concerns.

MCPS now has been found in violation of the Fourteenth Amendment for doing precisely what this Court said in *Swann* it could do. This Court has acknowledged that school districts face a delicate balance between two "related constitutional duties [that] are not always harmonious." *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (Powell, J., announcing the judgment). The first is the

> clear command from this Court, starting with *Brown* v. *Board of Education*, 349 U.S. 294 (1955), to eliminate every vestige of racial segregation and discrimination in the schools. Pursuant to that goal, race-conscious remedial action may be necessary. *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971). On the other hand, . . . public schools[ ] also must act in accordance with a "core purpose of the Fourteenth Amendment" which is to "do away with all governmentally imposed discriminations based on race." [*Id.*, quoting *Palmore* v. *Sidoti*, 466 U.S. 429, 432 (1984).]

Recent decisions in the lower federal courts, however, like this one, are pulling hard on one side of this dilemma and striking down any voluntary race-conscious school district activity in student assignment. Very recently, a different Fourth Circuit panel invalidated the magnet school assignment process used in Arlington County, Virginia, which was designed to create racially and ethnically diverse enrollments. *See Tuttle* v. *Arlington County School Bd.*, 1999 WL 986773 (4th Cir. Nov. 1, 1999). The panel in *Tuttle*, as here, flatly held that what it called "nonremedial racial balancing is unconstitutional." *Id.* at *5 (footnote omitted).

The First Circuit recently struck down the use of race as a factor in admissions for the Boston Latin School. *Wessman* v. *Gittens*, 160 F.3d 790 (1st Cir. 1998). Although less categorical in its condemnation of the use of race as one factor in student assignments, the First Circuit expressed its view that the "*Swann* dictum" is no longer good law, 160 F.3d at 796-97, and catalogued the confusion among the courts of appeals about whether this Court's more recent strict scrutiny cases undermine or reverse the earlier cases calling for deference to education authorities who elect to promote and foster racial and ethnic diversity in student enrollments. 160 F.3d at 797-800. The *Wessman* court could not reconcile *Hopwood,* 78 F.3d 932, which rejected any non-remedial consideration of race in law school admissions, with the fact that this

> Court and various individual Justices from time to time have written approvingly of ethnic diversity in comparable settings, *see, e.g., Wygant,* 476 U.S. at 315 (Stevens, J., dissenting); *Washington* v. *Seattle Sch. Dist. No. 1,* 458 U.S. 457, 472-73 (1982), or have noted that the issue remains open, *see Wygant,* 476 U.S. at 286 (O'Connor, J., concurring). [160 F.3d at 796.]

The Second Circuit has under advisement now an appeal from the grant of a preliminary injunction allowing a white student to transfer out of her public school in Rochester, New York, to attend a more heavily white suburban public school. *See Brewer* v. *West Irondequoit Cent. Sch. Dist.,* 32 F. Supp. 2d 619 (W.D.N.Y. 1999), *appeal pending,* No. 99-7186 (2d Cir.). The interdistrict transfer program involved was designed by the State of New York to alleviate racial isolation in metropolitan areas by permitting minority students voluntarily to transfer from cities to suburbs and white students to transfer from suburbs to cities. The district court concluded that the transfer program denied the right to Equal Protection of a white student living in Rochester who is not allowed to transfer to the suburbs:

> What emerges from the case law, especially the more recent case law, is the principle that classifications based

> SOLELY on race, in the absence of past identifiable governmental discrimination, are almost—if not absolutely—never permissible. [32 F. Supp. 2d at 631, *citing, inter alia, Hopwood,* 78 F.3d at 944.]

This recent trend in the case law on student assignment in elementary and secondary education runs counter not only to what educators had understood as this Court's teachings concerning their powers and duties, but the decisions in two other circuits allowing such race-conscious action in student assignment. Less than a month before the Fourth Circuit's decision in this case, the Ninth Circuit decided *Hunter*, 190 F.3d 1061, which reviewed a judgment after a trial on the merits and upheld consideration of race and ethnicity (as well as gender and family income) in the admission of students to an elementary school operated by UCLA's Graduate School of Education and Information Studies.

In addition, the Second Circuit has held that a New York City voluntary desegregation plan, approved by the State Commissioner of Education, that permits minority students at an overwhelmingly minority high school to transfer to schools with lower minority enrollments survives strict scrutiny. *Parents Ass'n of Andrew Jackson High Sch.*, 738 F.2d at 577, citing *Parents Ass'n of Andrew Jackson High Sch.* v. *Ambach*, 598 F.2d 705 (2d Cir. 1979). Parents of students at the high school claimed that the plan violated the Equal Protection Clause because it imposed a "racial quota" of minority students for potential receiving schools. 598 F.2d at 717. The Second Circuit accepted that a plan to promote lasting racial integration has a compelling purpose and that a school district may legitimately take account of "the unpleasant realities of population change and white flight when it seeks to *promote* integration." 598 F.2d at 719 (emphasis in original).

The results of the present case likely would have been different in the Ninth or Second Circuits, where the transfer policy would not have been deemed unconstitutional *per se* because it takes account of the race of students. For consideration of race in student assignments to be barred in

the Fourth Circuit but available elsewhere because it withstands strict scrutiny is a conflict that calls for this Court's resolution. *See* Sup. Ct. R. 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals"). School districts around the country are facing an onslaught of litigation concerning the use of race in the assignment of students to schools.[25] They should not be left to wonder what the law requires on a basic question that affects the learning conditions of millions of children.

B. The Fourth Circuit Decision Replaces Strict Scrutiny With *Per Se* Invalidation of Student Assignment Decisions That Take Race Into Account.

The strict scrutiny applied here by the Fourth Circuit was not only "'strict in theory but fatal in fact.'" *Adarand Constructors, Inc.* v. *Pena,* 515 U.S. 200, 237 (1995), quoting *Fullilove* v. *Klutznick,* 448 U.S. 448, 519 (1980). In the court's analysis, MCPS' consideration of race in weighing Jacob Eisenberg's transfer request counted against MCPS in three ways:

First, because race was a factor, the court employed strict scrutiny (a principle with which MCPS agrees). App. 10a.

Second, the Fourth Circuit held, the district court should have applied a "presumption against race based

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[25] In addition to the *Tuttle, Brewer* and *Hunter* cases, which still are pending, *see Belk* v. *Charlotte-Mecklenburg Bd. of Educ.* and *Capacchione* v. *Charlotte-Mecklenburg Bd. of Educ.*, Nos. 99-2389, 99-2391 (4th Cir.) (pending); *Rosenfeld* v. *Montgomery Cty. Pub. Schs.*, No. L-98-1793 (D. Md.) (pending); *Scott* v. *Pasadena Unified Sch. Dist.*, No. CV 99-1323 (C.D. Cal.) (pending); *Berman* v. *Clark County Sch. Dist.*, No. CV-5-98-01279-HDM (D. Nev.) (pending); *Comfort* v. *Lynn Sch. Comm.*, 99 CV 11811NG (D. Mass.) (pending); *Boston's Children First* v. *City of Boston*, 99 CV 11330NG (D. Mass.) (pending); *San Francisco NAACP* v. *San Francisco Unified Sch. Dist.*, Nos. C-78-1445 WHO, C-94-1445e WHO (N.D. Ca.) (pending); *Crawford* v. *Huntington Beach Union H.S. Dist.*, No. 814334 (Cal. Super. Ct. Orange Cty.) (pending).

classification." App. 9a. For that proposition, the court cited dicta in *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 272 (1979), which emphasized the stringency of the analysis used when government employs racial classifications. The Fourth Circuit treated the "presumption" as a shifting of the burden of proof, and condemned the MCPS transfer policy because MCPS had not created a record—in opposing a preliminary injunction motion involving a single student—to "*overcome this presumption.*" App. 10a (emphasis in original). The Fourth Circuit's insistence on a burden-shifting "presumption" is contradicted by this Court's requirement that "in 'reverse discrimination' suits, as in any other suit, it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated." *Wygant,* 476 U.S. at 292 (O'Connor, J., concurring in part and concurring in judgment); *id.* at 277-78 (Powell, J., announcing the judgment) ("the ultimate burden remains with the employees [challenging a racial classification in a lay-off plan] to demonstrate the unconstitutionality of an affirmative-action program").

Third, the Court of Appeals held that the ultimate "evil of the system in place" was that race may become outcome-determinative: A student can be denied a transfer that would be granted to a student of another race. App. 18a. That race can become the deciding factor in a transfer request became an insurmountable obstacle to constitutionality. A separate basis for invalidating the policy, the court declared, is that it involves "racial balancing" which is "unconstitutional," citing *Tuttle*, 1999 WL 986773 and *Podberesky* v. *Kirwan,* 38 F.3d 147, 160 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995). App. 19a. *See* App. 20a (the policy suffers "the compound constitutional wrong of an invalid racially based transfer policy sustaining invalid racial balancing").

The Fourth Circuit's rules automatically invalidating the policy because it can result in denial of a transfer and was labeled "racial balancing" have no support in this Court's strict scrutiny cases. This Court has held, to the contrary, that there may be legitimate bases for considering race in

governmental decisionmaking; strict scrutiny is the means of "smoking out" which uses are legitimate and which are mere pretexts for discrimination. Justice O'Connor's opinion for the Court in *Adarand* explained that the fact that strict scrutiny is applied "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny." 515 U.S. at 230. Indeed, this Court remanded in *Adarand* upon determining that strict scrutiny should be applied, so that the facts concerning narrow tailoring and the details of the complex contracting program at issue could be developed, although that scheme clearly considered the race of bidders. 515 U.S. at 237-39. The point of such careful examination, through "evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking." 515 U.S. at 228.

For similar reasons, in *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), the Court rejected the argument that "remedial" classifications should receive a relaxed level of scrutiny from the outset, because a court cannot know that a classification is remedial "without first engaging in an examination of the factual basis for its enactment and the nexus between its scope and that factual basis." 488 U.S. at 494-95. Four Justices supporting the judgment emphasized that, where a remedial justification is offered, "[p]roper findings . . . are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects." *Id.* at 510 (O' Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.). *Accord*, *id.* at 519 (Kennedy, J., concurring in part and concurring in the judgment) (case-by-case determination rather than "a rule of automatic invalidity for racial preferences" is workable, in accord with precedent, and respects the responsibility of the political branches to act without being ordered to do so by a court).

Here, the Court of Appeals "assume[d]" that "diversity" is a compelling governmental interest. App. 13a. The Fourth Circuit further assumed that avoidance of racial isolation and "diversity" are the same thing, but did not address the fact

that Glen Haven will not only lose "diversity" but will become all-minority in the foreseeable future if transfer requests like Jacob Eisenberg's must be granted. The court thus failed to conduct a meaningful analysis of whether "the means chosen to accomplish the . . . asserted purpose [were] specifically and narrowly framed to accomplish that purpose." *Wygant*, 476 U.S. at 280. *Accord*, *Fullilove*, 448 U.S. at 480. The Fourth Circuit simply dismissed the District's preliminary injunction evidence on narrow tailoring because, the panel said, the District was engaged in "racial balancing" because race could still be outcome determinative in some instances. *E.g.*, App. 19a (fact that MCPS also denies transfer requests for African-American or Hispanic students to avoid racial isolation "does not matter" because "a denial of transfer to African-Americans or other minorities on account of their race is no less unconstitutional than the denial to Jacob [Eisenberg] was here").

That the Fourth Circuit's invalidation of the transfer policy rests on a rule of law and not on careful fact findings about the policy at issue is betrayed by the court's rush to judgment without awaiting any fact finding whatsoever in the trial court on the issues raised by the plaintiffs' prayer for a permanent injunction. The appellate court entered its own findings of fact, many of which are clearly erroneous and unsupported by the record.[26] The Fourth Circuit simply

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[26] The Fourth Circuit's conclusion that MCPS administers the transfer policy "with an end toward maintaining [the District-wide] percentage of racial balance in each school," App. 15a, is clearly erroneous and unsupported by record evidence, since racial and ethnic composition is not reviewed at all for transfers in and out of many schools with racial compositions substantially different from the District-wide enrollment, because the student population is stable at those schools. *Cf.* App. 34a. It is only where the representation of a racial or ethnic group at a school is substantially different (more than 1.5 standard deviations) from the District as a whole, and exhibits a pattern of movement away from the District-wide average over time, that MCPS even screens transfers in or out of the school to determine whether they will contribute to racial isolation. App. 34a. The transfer policy thus works at the margins to protect against creation of racial isolation through the transfer process. The Fourth Circuit panel developed its own definitions to explain how the

concluded that an "evidentiary hearing . . . would not have altered the result," App. 20a, ignoring the district court's warning that further evidence would be required on the overall effect of the plan before a permanent injunction decision on the narrow tailoring issue. App. 30a. The preliminary injunction record lacked a full historical account of the evidence before MCPS when it adopted the policy, a record of the changes MCPS made in the policy over time as the result of experience and changed circumstances, information on the number of students denied transfers due to the impact on diversity, data on the impact of the denials on sending and receiving schools, and information showing the racial compositions of sending and receiving schools that would have resulted if such transfers had been granted. The limited record was the direct result of the plaintiffs' assertion that they were not seeking District-wide relief at the preliminary injunction stage.

In the context of a constitutional inquiry in which this Court has called for careful fact-finding, such expedited preliminary injunction proceedings simply should not serve as a launch pad for a decision on the merits. *See University of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981) (because of the haste that is necessary to preliminary injunction proceedings and the resulting incomplete record, "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits"); *Brown* v. *Chote*, 411 U.S. 452, 456 (1973) (because preliminary injunction granted on scanty record, Court refused to decide merits of constitutional claim); *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-57 (1948) ("summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation,

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District-wide student racial data is used in weighing transfers and criticized MCPS for the way it explained the process. App. 4a n.4. This is precisely the kind of confusion avoided by testimony and careful fact-finding.

contracting and practice"). That the Fourth Circuit saw no need for development of a factual record simply underscores that it has adopted a broad, bright line test in an area where the Court's decisions have emphasized the need for factual findings and careful procedures.

C. The Fourth Circuit Decision Leaves School Administrators With Conflicting Guidance on Factors That May Be Considered in Student Assignment, a Basic Area of School District Operation, Making This Court's Intervention Necessary.

The Fourth Circuit decision forces MCPS, if for educational purposes it favors some parental choice in student assignment, to contribute knowingly to racial isolation by allowing parents who live in the immediate neighborhood of a local school where their race is in the minority an unfettered opportunity to choose another school where their race is substantially in the majority. MCPS' basic student assignment policy supports children attending neighborhood schools. This is not a case in which a school district mandates that students attend schools outside of their neighborhoods in order to achieve a racial balance that reflects the overall district. By denying a transfer to Jacob Eisenberg, MCPS is trying to prevent use of its own student transfer process as a means for children to exit their neighborhoods, even if they thereby create racial isolation.

There simply is not enough room between the principle prohibiting racial segregation and a new principle prohibiting "racial balancing" to permit MCPS and other public school districts in the Fourth Circuit to operate consistently with the law. Public schools across the United States serve increasing numbers of racial minority and immigrant students.[27] The

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[27] *See* Digest of Education Statistics, 1998 (U.S. Dept. of Educ.), Table 93 (distribution by race of enrollments in school districts with more than 15,000 students).

task of avoiding segregation is today as much a suburban as an urban challenge.[28]

At the same time, public school choice programs, configured in a wide variety of ways, are proliferating at the federal, State and local levels, to the point that choice is becoming unavoidable.[29] Congress recently attached to its major funding bill for elementary and secondary schools a requirement that students must be allowed to transfer out of designated low-performing schools. *See* H.R. 3424, 106th Cong., 145 Cong. Rec. H12392 (daily ed. Nov. 17, 1999) (enacted) (appropriating Title I funds with proviso that "local educational agencies shall provide all students enrolled in a school identified [as low-performing] with the option to transfer to another public school within the local educational agency, including a public charter school, that has not been identified for school improvement"). The low-performing school designation is expected to apply to more than 7,000 schools, that educate millions of students, next year. 145 Cong. Rec. H12798-801 (daily ed. Nov. 18, 1999) (statement of Rep. Goodling).

Like States and other school districts around the country, MCPS has made an educational judgment that giving parents the opportunity to exercise choice among public schools may create greater public satisfaction and hold educational benefits. MCPS also agrees with the substantial educational research verifying that school desegregation yields enhanced achievement for African-American students, especially when undertaken voluntarily and at the early elementary grades.[30]

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[28] *See* William O. O'Hare & William H. Frey, *Booming, Suburban, and Black*, Am. Demographics (Sept. 1992) at 30.

[29] *See* App. 43a, listing 15 State statutes that permit or require public school choice within or between school districts. Public charter school legislation also generally permits parents to choose to enroll their children in publicly funded schools operated without certain State and local regulatory requirements. Thirty-seven States have passed public charter school legislation. Those statutes are listed in App. 44a-46a.

[30] *See, e.g.*, Janet W. Schofield, *Review of Research On School Desegregation's Impact on Elementary And Secondary School Students*,

Studies further demonstrate that children who have desegregated elementary and secondary schooling are more likely to choose integrated colleges, residential neighborhoods, and work places.[31]

These educational judgments should be accorded greater deference than they were shown by the Fourth Circuit's bright-line rule against consideration of race in student assignments. "'[L]ocal autonomy of school districts is a vital national tradition.'" *Freeman* v. *Pitts*, 503 U.S. 467, 490 (1992), quoting *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 410 (1977). "Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs." *Board of Educ. of Oklahoma City Pub. Schs.* v. *Dowell*, 498 U.S. 237, 248 (1991). Student assignment is one of the most difficult and important local school district functions. The Fourth Circuit decision nullifies school district authority to manage student assignment on the sensitive issue of the racial composition of schools within the Fourth Circuit, and conflicts with decisions in other courts upholding—or at least giving consideration to—such efforts by school districts elsewhere. School districts nationwide need this Court's definitive guidance on whether local school authorities have power to manage transfer processes so that they may give families the benefit of public school choice with safeguards that avoid inflicting on children a racially isolated classroom experience.

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in *Handbook Of Research On Multicultural Education*, 597, 599-602 (James A. Banks ed., 1995); Robert L. Crain & Rita E. Mahard, *Research on Minority Achievement in Desegregated Schools*, 103, 109 (Christine H. Rossell & Willis D. Hawley eds., 1983); U.S. Commission on Civil Rights, *Racial Isolation In The Public Schools*, 91 (1967).

[31] *See* Jomills H. Braddock II and James M. McPartland, *Social Psychological Processes That Perpetuate Racial Segregation: The Relationship Between School And Employment Desegregation*, 19 J. of Black Studies, No. 3, 267, 285 (1989); William Trent, *Outcomes Of School Desegregation: Findings From Longitudinal Research*, 66 J. of Negro Educ., No. 3, 255, 257 (1997).

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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December 23, 1999

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JEFFREY EISENBERG, on behalf of Jacob Eisenberg,
Plaintiff-Appellant,
and
ELINOR MERBERG, on behalf of Jacob Eisenberg,
Plaintiff,
v.
MONTGOMERY COUNTY PUBLIC SCHOOLS; PAUL VANCE, DR., Superintendent, in his official and personal capacity, MONTGOMERY COUNTY BOARD OF EDUCATION, Members, in their official and personal capacity,
Defendants-Appellees.
United States of America,
Amicus Curiae.

No. 98-2503

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Alexander Williams, Jr., District Judge. (CA-98-2797-AW)

Argued: June 10, 1999

Decided: October 6, 1999

Before: WIDENER, NIEMEYER, AND TRAXLER, Circuit Judges.

Reversed and remanded with instructions by published opinion. Judge Widener wrote the opinion, in which Judge Niemeyer and Judge Traxler joined.

COUNSEL

ARGUED: Jeffrey Eisenberg, Silver Spring, Maryland, for Appellant. Patricia Ann Brannan, HOGAN & HARTSON, L.L.P., Washington, D.C., for Appellees. Rebecca K. Troth, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae. **ON BRIEF:** Maree F. Sneed, Audrey J. Anderson, HOGAN & HARTSON, L.L.P., Washington, D.C.; Judith S. Bresler, REESE & CARNEY, L.L.P., Columbia, Maryland, for Appellees. Bill Lann Lee, Acting Assistant Attorney General, Mark L. Gross, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae.

OPINION

WIDENER, Circuit Judge:

The issue in this case is whether the Montgomery County Board of Education may deny a student's request to transfer to a magnet school because of his race. We hold that it may not.

Jacob Eisenberg appeals the district court's denial of his motion for a preliminary injunction to compel his admittance to the math and science magnet program at Rosemary Hills Elementary School. Jacob originally applied for a transfer to Rosemary Hills Elementary School for the 1998-99 school year, his first grade year, and was denied his request by Montgomery County on May 15, 1998 due to the "impact on diversity." Jacob is currently preparing to enter the second grade at Glen Haven Elementary, his assigned school, based on his residence. On his transfer request application, Jacob identified his racial/ethnic group as "White, not of Hispanic origin," and accordingly, under Montgomery County's

transfer policy, particularly its "diversity profile,"[1] he was not allowed to transfer out of Glen Haven Elementary School. We reverse the district court's order denying Jacob's motion for a preliminary injunction and remand this case for action consistent with this opinion.

I.

Montgomery County educates more than 125,000 elementary and secondary students enrolled at over 183 schools spread throughout 500 square miles. The County has never been subject to a court order for desegregation,[2] rather, Montgomery County by its voluntary efforts dismantled the former segregated school system. One aspect of its efforts included the implementation of magnet school programs,[3] which would attract and retain diverse student enrollment on

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[1] The Superintendent, Dr. Paul L. Vance, stated in his August 6, 1998 letter regarding Jacob's Transfer Appeal that "[t]he diversity profile group ... means that white students cannot transfer out of Glen Haven Elementary School unless there is a unique hardship circumstance."

[2] Likewise, there has never been a judicial finding of a constitutional violation within Montgomery County's educational setting. In 1981, however, the Office of Civil Rights investigated a parent's complaint filed against Montgomery County alleging that it was "resegregating Rosemary Hills Primary School by improperly approving student transfers ... without the approval of the Quality Integrated Education team," thereby failing to prevent minority isolation at Rosemary Hills. Montgomery County's transfer policy at issue here was adopted in response to this complaint. The fact that Rosemary Hills was the subject of the 1981 action is entirely coincidental to, and has no relevance to, the fact that the Rosemary Hills magnet school program is the subject of this case.

[3] Magnet programs offer enriched curricula emphasizing specific areas; e.g., science, math, or a foreign language. In fact, admission to Rosemary Hills magnet school is not based on merit. Montgomery County points out that if Rosemary Hills receives more transfer requests than it has seats, the names of the eligible students are placed in a lottery and selected randomly. *See* County Br. at 9, n.4. This being true, Jacob would not have been eligible for the lottery because he was not allowed to transfer out of Glen Haven based on his race.

a voluntary basis to schools outside the area in which the student lives. A magnet program emphasizing math and science is located at Rosemary Hills Elementary School. Montgomery County permits voluntary transfers from an assigned school to another school under certain circumstances as outlined in its School Transfer Information Booklet.[4]

Montgomery County considers, in stages, several factors in the consideration of a voluntary transfer request: first, school stability;[5] second, utilization/enrollment; third, diversity profile; and last, the reason for the request. All of the

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[4] Throughout its Transfer Booklet and its briefs, Montgomery County uses the terms "county-wide average," "average county-wide range," and in one footnote in its Reply Brief, "one-and-one-half standard deviations," to describe the method used to compare the racial/ethnic student population in each particular school to that of other schools and to the overall racial/ethnic student population enrolled in Montgomery County Public Schools. These terms are interchangeably and indistinguishably used by Montgomery County with no apparent recognition of the ordinary true meanings of each term. For instance, an average is "exactly or approximately the quotient obtained by dividing the sum total of a set of figures by the number of figures." *Webster's Ninth New Collegiate Dictionary* 119 (9th ed. 1985). A range is defined as "the difference between the least and the greatest values of an attribute." *Webster's Ninth New Collegiate Dictionary* 974 (9th ed. 1985); *see also* David W. Barnes, *Statistics as Proof* 77 (1983) (explaining a range as "the distance between the largest and smallest numbers."). A standard deviation "represents the typical [variation] from the mean or expected value for a population (or list of numbers)." David W. Barnes, *Statistics as Proof* 81 (1983). For our purposes in this opinion, we have assumed that each of these terms refers to the actual *percentage* of students in a racial/ethnic group within the student population enrolled in each of the Montgomery County Public Schools, and, as well, the *percentage* of students in each of the various racial/ethnic groups in the student population of the Montgomery County Public Schools, taken as a whole.

[5] Stability refers to whether the assigned school and the requested school are undergoing a boundary change, consolidation, or renovation that requires students to attend school at an alternative site or whether either school is undergoing some other change that requires the enrollment to remain stabilized.

transfer applications are considered concurrently, and if the assigned school and the requested school are ruled stable, the transfer request is reviewed for utilization/enrollment. An underutilized school is operating below 80% capacity and an overutilized school is operating above 100% capacity.

The utilization factor for each school is determined prior to the receipt of transfer requests and is indicated, for each school in the system, in the Transfer Booklet. Overutilization or underutilization may affect a transfer request, in fact, Montgomery County states that these transfer request(s) usually will be denied.[6] Along with utilization, enrollment is considered to ensure that schools remain within the preferred range of enrollment.[7] If these factors are not a concern, Montgomery County looks to the diversity of the student body of the assigned and the requested schools.

A. *Diversity Profile*

According to the Transfer Booklet, "[t]ransfers that negatively affect diversity are usually denied." Students are identified according to their racial/ethnic group: African American, Asian, Hispanic, and White. Montgomery County compares the countywide percentage for each racial/ethnic group to the percentage of each group attending a particular school, and also determines whether the percentage of each racial/ethnic group in that school has either increased or decreased over the past three years. Based on that information, Montgomery County then assigns to each racial/ethnic group within each school a diversity category.[8]

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[6] Each school has an "0" or a "U" or a blank space (if the utilization is optimal).

[7] The preferred range of enrollment refers to the number of classes of students per grade for elementary schools. For example, 2 to 4 classes of students per grade is preferred in elementary schools. If a school with sufficient capacity fails to meet [has fewer classes than] the preferred range, transfers out of that school are usually not permitted.

[8] If the percentage of the identified racial/ethnic group within a school is within the countywide percentage for that group and is expected to

Categories 1 and 2 are reserved for the racial/ethnic group populations within a school, the percentages of which are higher than the countywide percentage for that particular group. Category 1 refers to racial groups, the percentage of which is higher than the countywide percentage for that group and has increased over time rather than moved closer to the countywide percentage. Transfers usually will not be permitted by a student into a school with a designated category 1 for his racial/ethnic group because his racial/ethnic group percentage at that requested transfer school is already higher than the countywide percentage. Category 2 refers to racial/ethnic populations which, although higher than the countywide percentage, have tended to decline over time. Some transfers are permitted into this group. Categories 3 and 4 indicate a racial/ethnic percentage within a school that is below the countywide percentage. Category 3 is reserved for those racial/ethnic groups, the percentage of which has tended to decline over time; while category 4 includes those populations the percentage of which has tended to increase. For example, "if a particular school has had a declining white enrollment over the preceding three year period and is substantially below the average [c]ounty-wide enrollment of white students [a Category 3], the District may restrict transfers of white students out of that school because they would contribute to that school becoming racially isolated."[9] County Br. at 7.

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remain the same for the near future, that racial/ethnic group will not be assigned a diversity category.

[9] Jacob faced this very situation. Glen Haven, his assigned school, and Rosemary Hills, his requested school, had the following notations for utilization and for diversity profile:

School	*Utilization*	*African-American*	*Asian*	*Hispanic*	*White*
Glen Haven	Overutiliz.	1		1	3
Rosemary Hills			3		

As is the County's, the diversity profile for each school is reevaluated and adjusted annually.

B. *Jacob's Transfer Application*

In March of 1998, Jacob's parents submitted a request that he be transferred from Glen Haven to Rosemary Hills to begin the first grade, reasoning that Jacob's "personal and academic potential" would benefit from the school's math and science emphasis. His transfer request was approved by his kindergarten teaching team. Jacob, as a white student, was part of a category 3 group at Glen Haven Elementary School because at the time of Jacob's transfer request, Glen Haven's student body was 24.1% white compared to the Montgomery County-wide percentage of 53.4%, and the white enrollment at Glen Haven dropped from 38.9% in 1994-95 to 24.1% in 1997-98. See *Eisenberg v. Montgomery County Public Sch.*, 19 F. Supp. 2d 449, 451 (D. Md. 1998). On May 15, 1998, his transfer was denied. The sole reason given by Montgomery County for the denial was "impact on diversity," that is to say because Jacob was white. Jacob did not demonstrate a "unique personal hardship"[10] to obtain an exemption from the denial based on the negative impact on diversity. The Eisenbergs submitted their appeal first to the Superintendent, and then to the Board of Education, which denied the transfer request on August 26, 1998.

Jacob's parents sought declaratory and injunctive relief as well as damages on behalf of Jacob in the district court under 42 U.S.C. § 1983, the Equal Protection Clause, and under 42 U.S.C. § 2000(d). The district court denied the Eisenbergs' motion for a preliminary injunction on September 9, 1998 on

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10 Five white students, out of 19 who applied, were permitted to transfer out of Glen Haven for the 1998-99 school year on a personal hardship basis. Four of these transfers were permitted because the transferring student had a sibling already attending the requested school.

the basis that the Eisenbergs made an insufficient showing of likelihood of success on the merits.[11]

The district court concluded that Montgomery County's asserted interests in both the diversity of its student body and avoidance of potential segregative enrollment patterns were each sufficiently compelling governmental interests to justify the transfer policy's race based classifications under a "strict scrutiny" review applied in Equal Protection cases.[12] *See Eisenberg,* 19 F. Supp. 2d at 453-54. The district court further concluded that the transfer policy had "been designed as narrowly as possible while still furthering [Montgomery County's] stated interests." *Eisenberg,* 19 F. Supp. 2d at 455.

Following the denial of the preliminary injunction, the Eisenbergs appealed to this court and Jacob entered the first

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11 The district court applied the Fourth Circuit's standards for injunctive relief, *see Blackwelder Furniture Co. of Statesville, Inc. v. Seilig. Mfg. Co., Inc.*, 550 F.2d 189 (4th Cir. 1977), and first considered the threat of irreparable harm to Jacob should the court not issue an injunction, and the likely harm to Montgomery County if an injunction should be ordered, and then balanced these two interests. *See Eisenberg*, 19 F. Supp. 2d at 452 (citing *Manning v. Hunt*, 119 F.3d 254, 263 (4th Cir. 1997)). Next, the court considered the likelihood that the plaintiff would succeed on the merits noting that as the likelihood of harm to the defendant increased, the burden on the plaintiff to demonstrate likelihood of success also increased. *See Eisenberg*, 19 F. Supp. 2d at 452. Finally, the court accounted for the public interest. *See Eisenberg*, 19 F. Supp. 2d at 452.

In this instance, the district court concluded that the balance of hardships favored Montgomery County, though only slightly. Thus, the court looked to the Eisenbergs to make a strong showing regarding their likelihood of success on the merits. Finding none, the district court denied their motion for preliminary injunction.

12 The district court said that it applied the strict scrutiny review fashioned in *Richmond v. Croson,* 488 U.S. 469, 493 (1989) (plurality opinion). "A challenged policy or decision can survive such 'strict scrutiny' review only if it is justified by a 'compelling governmental interest' and is 'narrowly tailored' to accomplish that goal." *Eisenberg,* 19 F. Supp. 2d at 452.

grade at his assigned school, Glen Haven. We review the denial of the preliminary injunction *de novo* since the district court based its decision solely on a premise and interpretation of the applicable rule of law and the facts are established. *See Williams v. United States Merit Sys. Protection Bd.*, 15 F.3d 46, 48 (4th Cir. 1994).

II.

"Race is the perpetual American dilemma." J. H. Wilkinson, III, *From* Brown *to* Bakke 8 (1979). Once again, we find ourselves addressing a most difficult issue in the familiar setting of our public schools. The facts also appear all too familiar - a child has been denied access to a state funded educational opportunity because of the color of his skin.[13] In this case there is no denial that racial classifications result in the denial of a certain number of transfers because Montgomery County fears racial imbalance within its schools, and to combat this potential problem, Montgomery County employs a race-conscious nonremedial transfer policy which amounts to racial balancing.

A.

Initially, the district court erred when it failed to adhere to, or even to mention, the presumption against race based classifications. See *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) ("racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only on extraordinary justification."). In *Podberesky v. Kirwan, (Podberesky II)*, a case involving an exclusively African-American scholarship program at the University of Maryland, we emphasized that presumption and "the

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[13] Although the Montgomery County transfer policy uses the same method in considering all students within all racial/ethnic groups, at the individual school level, an African American student may be denied access due to his category designation, where a White student would be granted his transfer request, and vice versa.

constitutional premise that race is an impermissible arbiter of human fortunes," even when using race as a "reparational device" or as a "remedial measure" for past discrimination. 38 F.3d 147, 152 (4th Cir. 1994), *cert. denied, Kirwan v. Podberesky,* 514 U.S. 1128 (1995); *Maryland Troopers Ass'n, Inc. v. Evans,* 993 F.2d 1072, 1076 (4th Cir. 1993). In accordance with that principle, we concluded that government institutions that choose to employ racial classifications face "the presumption that [such a] choice can not be sustained." *Podberesky II,* 38 F.3d at 152. Montgomery County was burdened with this presumption, and although the district court analyzed the transfer policy under strict scrutiny review, it failed to take the presumption into account when it denied Jacob's request for a preliminary injunction. *There is nothing in the record to overcome this presumption.*

B.

It is undisputed that the transfer policy considers race as the sole determining factor, absent a "unique personal hardship," if the assigned school and the requested school are both stable and their utilization/enrollment factor are acceptable for transfers. While whites and non-whites are not singled out for different treatment, they are all subject to being denied a transfer request solely on the basis of their race. Any racial classification, including that present here, must survive strict scrutiny review; failing such review manifests a violation of Jacob's constitutional rights.[14] *See Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227 (1995). Strict scrutiny review requires the racial classification to serve a

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[14] In its review of Jacob's asserted irreparable harm, the district court stated that, if proven, a violation of Jacob's constitutional rights constitutes per se irreparable harm. *See Eisenberg*, 19 F. Supp. 2d at 452 (citing *Johnson v. Bergland,* 586 F.2d 993, 995 (4th Cir. 1978); *Henry v. Greenville Airport Comm'n,* 284 F.2d 631, 632-33 (4th Cir. 1960)). The district court found the irreparable harm to be slight and balanced the hardships in favor of Montgomery County.

compelling governmental interest and be narrowly tailored to achieve that interest. *See Adarand,* 515 U.S. at 227. The diversity profile factor of the transfer policy employs such racial classifications which "are simply too pernicious to permit any but the most exact connection between justification and classification." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (quoting *Fullilove v. Klutznick,* 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)).

The district court's determination that the Eisenbergs did not have a strong likelihood of success on the merits stemmed from its strict scrutiny review. The district court labeled its review as exacting and determined that each of the two interests advanced by Montgomery County were sufficiently compelling; the first interest in avoiding the creation of segregative enrollment by racial isolation, and the second interest in promoting a diverse student population. *See Eisenberg,* 19 F. Supp. 2d at 452-55. A further examination of these two interests, and application of this court's reasoning in our recent case regarding racial classifications within an elementary school setting, *Tuttle v. Arlington County Sch. Bd.,* No. 98-1604 (4th Cir. Sept. 24, 1999), reveals that Montgomery County's transfer policy cannot pass constitutional muster.

Moreover, we believe the district court erred in its finding that the Eisenbergs are not likely to succeed on the merits, given that the record demonstrates that Montgomery County's transfer policy is not a remedial race-conscious policy. *See Eisenberg,* 19 F. Supp. 2d at 451-52. Montgomery County has never been under a court order to desegregate, having acted voluntarily to dismantle segregation after the Supreme Court's decision in *Brown v. Board of Educ.,* 347 U.S. 483 (1954). *See Eisenberg v. Montgomery County Public Sch.,* 19 F. Supp, 2d at 451; County Br. at 4. Montgomery County formed a Quality

Integrated Education policy in 1975,[15] and the present transfer policy reflects the Quality Integrated Education policy goals of "avoiding racial isolation and promoting diverse enrollments." *See* County Br. at 4. Notwithstanding that race based classifications have been tolerated in situations where past constitutional violations require race based remedial action, see *Swann v. Charlotte Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Brewer v. School Bd. of City of Norfolk*, 456 F.2d 943 (4th Cir.), *cert. denied, School Bd. of City of Norfolk v. Brewer*, 406 U.S. 933 (1972), we do not face that type of scenario in this case. No court has ever made a finding that Montgomery County Public Schools were not unitary, therefore, the transfer policy does not correct any past constitutional violations.

III.

We next examine whether a compelling governmental interest exists. Although Montgomery County advances two interests, each of which it argues constitutes a sufficiently compelling state interest under strict scrutiny, we are of opinion that, despite the different nomenclature, these interests are one and the same.[16] *See Brewer v. West Irondequoit Cent. Sch. Dist.*, 32 F. Supp. 2d 619, 627 (W.D.N.Y. 1999) (describing the avoidance of racial isolation as "a negatively-phrased expression for attaining the opposite of racial isolation which is racial diversity."). *Tuttle*

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15 Montgomery County asserts that the Quality Integrated Education policy was part of the voluntary effort to support integrated schools. This policy was adopted more than 20 years after *Brown*, and we note that today, over 45 years have passed since *Brown*.

We especially note that at about the time of inception of the transfer policy, 1981, a complaint of the U. S. Department of Education was that the "racial balance" was being upset in certain schools by the county transfer policy. This was prior to *Freeman, infra*, of course.

16 The district court considered each interest separately and concluded that each was sufficiently compelling to justify the questioned policy. *See Eisenberg*, 19 F. Supp. 2d at 453-54.

notes that whether diversity is a compelling governmental interest remains unresolved, and in this case, we also choose to leave it unresolved. *See Tuttle,* No. 98-1604, slip op. at 11-12 (4th Cir. Sept. 24, 1999); *but see Hopwood v. Texas,* 78 F.3d 932, 944 (5th Cir. 1996), *reh'g en banc denied,* 84 F.3d 720 (5th Cir.), *cert. denied,* 518 U.S. 1033 (1996) (holding that "consideration of race or ethnicity by the [University of Texas] law school for the purposes of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."). We will assume, without holding, as the *Tuttle* court assumed,[17] that diversity may be a compelling governmental interest, and proceed to examine whether the transfer policy is narrowly tailored to achieve diversity. *See Tuttle,* No. 981604, slip op. at 11 - 12 (4th Cir. Sept. 24, 1999). No inference may here be taken that we are of opinion that racial diversity is a compelling governmental interest.

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17 The First Circuit assumed that diversity may suffice as compelling without so holding, see *Wessmann v. Gittens,* 160 F.3d 790 (1st Cir. 1998) (declining to decide, in the context of a race based admissions program to one of Boston's better public secondary schools, that diversity can never be a compelling state interest but, instead, determining that it was not narrowly tailored to achieve the desired end). Other circuits have faced related issues in different circumstances, see *Taxman v. Board of Educ. of the Township of Piscataway,* 91 F.3d 1547 (3d Cir. 1996) (refusing to find support in the Court's Equal Protection cases for the notion that diversity or affirmative action were sufficient justifications for making race a factor in the termination decision of one of two equally qualified teachers in a nonremedial situation under Title VII); *Lutheran Church-Missouri Synod v. Federal Communications Comm'n,* 141 F.3d 344 (D.C. Cir. 1998) (holding that "diversity of programming" was an insufficient justification to uphold aspects of the FCC's licensing program (which, in essence, pressured stations to maintain a workforce that mirrored the racial composition of their area) under strict scrutiny's compelling state interest test); *McNamara v. City of Chicago;* 138 F.3d 1219, 1222 (7th Cir. 1998) (referring to the issue as unsettled.). We should not leave the various opinions of the courts of appeal without noting that *Lutheran Church* also reasoned that ". . . it is impossible to conclude that the government's interest, no matter how articulated, is a compelling one." 141 F.3d at 355.

The present case and *Tuttle* are nearly indistinguishable in that both involve public school policies, here the Montgomery County transfer policy and in *Tuttle,* the Arlington County admissions policy for the Arlington Traditional School, in place "not to remedy past discrimination, but rather to promote racial [and] ethnic" diversity. *Tuttle,* No. 98-1604, slip op. at 3 (4th Cir. Sept. 24, 1999). Even in the remedial context, where the state-sponsored program or policy exists to remedy the proximately caused present effects of past discrimination, we have not decided the question of whether diversity is a compelling governmental interest. *See Tuttle,* No. 98-1604, slip op. at 11 n. 7 (4th Cir. Sept. 24, 1999) (citing *Alexander v. Esteep,* 95 F.3d 312, 316 (4th Cir. 1996); *Hayes v. North State Law Enforcement Officers Ass'n,* 10 F.3d 207, 213 (4th Cir. 1993) (holding that there was insufficient evidence to prove that race based promotion to achieve racial diversity was a compelling interest); *Podberesky v. Kirwan,* 956 F.2d 52, 56 n.4 (4th Cir. 1992) *(Podberesky* I). Similarly, the Supreme Court has not decided this issue. *See Regents of Univ. of California v. Bakke,* 438 U.S. 265, 269 (1978). We thus do not decide that racial/ethnic diversity is a compelling state interest and proceed to the second part of the strict scrutiny analysis.

IV.

This court's mention of *Bakke* in *Talbert v. City of Richmond*[18] does not lead us to conclude that Montgomery County's use of racial classifications in its transfer decisions is narrowly tailored to the interest of obtaining diversity. In

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18 *Talbert v. City of Richmond,* 648 F.2d 925, 931 (4th Cir. 1981), involved police officer promotion and stated that "the attainment of racial diversity in the top ranks of the police department was a legitimate interest of the city." In *Hayes v. North State Law Enforcement Officers Ass'n,* 10 F.3d 207 (4th Cir. 1993), however, we held that legitimate is not necessarily compelling. 10 F.3d at 213 ("We did not determine that the interest was sufficiently 'compelling' to justify racial classifications under the strict scrutiny standard.").

fact, we find that it is mere racial balancing in a pure form, even at its inception. The County annually ascertains the percentage of enrolled public school students by race on a countywide basis, and then does the same for each school. It then assigns a numbered category for *each race at each school,* and administers the transfer policy so that the race and percentage in each school to which students are assigned by residence is compared to the percentage of that race in the countywide system. The transfer policy is administered with an end toward maintaining this percentage of racial balance in each school. This is, by definition, racial balancing. As we have only recently held in *Tuttle* "[s]uch nonremedial racial balancing is unconstitutional." *Tuttle, No.* 98-1604, slip op. at 11 & n. 10 (4th Cir. Sept. 24, 1999). Montgomery County's transfer policy, at its inception, was to "further provide[ ] for transfers ... providing that the transfer does not adversely affect the *racial balance* in either the sending or the receiving school." Letter from U. S. Department of Education to Superintendent Andrews, Feb. 28, 1981 (italics added). Although the transfer policy does not necessarily apply "hard and fast quotas,"[19] its goal of keeping certain percentages of racial/ethnic groups within each school to ensure diversity is racial balancing.[20]

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19 The district court pointed to the fact that some transfers are allowed based on "personal hardship and family unity" as evidence that the transfer policy was not rigidly applied. *See Eisenberg,* 19 F. Supp. 2d at 455. This does not detract from the wrong done by denial of a transfer, as here, on the basis of race.

20 Although the district court decided that, in its opinion, diversity was a compelling governmental interest, its finding that "the [county] does not apply hard and fast quotas" is a tacit acknowledgment that if such were the case, its decision would have been different. *Eisenberg,* 19 F. Supp. 2d at 454. The fact that, for any reason personal to him, only a distinct personal hardship can save any student, regardless of his race, from having his transfer request decided on the basis of race, makes it tempting to decide the general question of whether or not diversity is a compelling governmental interest. However persuasive the arguments, and however tantalizing the facts in this case are, we resist that temptation and do not decide the question because it is not absolutely

The Court dealt with the issue of nonremedial racial pupil assignment in both *Pasadena Bd. of Educ. v. Spangler,* 427 U.S. 424 (1976), and *Freeman v. Pitts,* 503 U.S. 467 (1992). In *Spangler,* the Supreme Court affirmed the Ninth Circuit's finding that it would be beyond the remedial authority of the district court to require the annual readjustment of school attendance zones to counteract changes in the racial makeup of the schools.[21] *See Spangler,* 427 U.S. at 436. In the Ninth Circuit's subsequent opinion in *Spangler v. Pasadena Bd. of Educ.,* the court recognized the Supreme Court's emphasis on the idea "that when a large percentage of minority students in a neighborhood school results from housing patterns for which school authorities are not responsible, the school board may not be charged with unconstitutional discrimination if a racially neutral assignment method is adopted." 611 F.2d 1239, 1244 (9th Cir. 1979). Thus, in the situation before us, if racial isolation, meaning low or high percentages of either racial minorities or non-minorities may be feared because transfer requests are granted to students when the assigned and requested schools are both stable and at appropriate utilization levels, any found racial imbalance would not be a vestige of a prior de jure system. If racial imbalance occurs in some of the Montgomery County schools because students like Jacob, for example, are permitted to transfer to magnet schools to get a better education, any racial or ethnic imbalance is a product of "private choices [and] it does not have constitutional implications." *Freeman v. Pitts*, 503 U.S. 467, 495 (1992).

In *Freeman,* racial disparities surfaced because of great growth in the DeKalb area after 1986; from 70,000 to 450,000 and the attraction of African-Americans to the area

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necessary to our decision. See *Ashwander v. TVA,* 297 U.S. 288, 341, 346-47 (1936) (Brandeis, J., concurring).

21 Clearly, Montgomery County has not been found to initially assign students to schools based on race, rather students are assigned by residence. Nonetheless, Montgomery County is attempting to keep schools racially balanced by controlling and monitoring transfers. Jacob's request to transfer to Rosemary Hills is one of them.

contributed to a racial imbalance within the school district after the district had been declared unitary in the student assignment area. 503 U.S. at 480. In this case, Montgomery County has implemented magnet schools to attract students of all racial/ethnic backgrounds to be a part of a different learning environment. Predictably, students of all backgrounds are attracted to the magnet school and, as a result, racial imbalance may then occur in some other schools, if it occurs at all. A potential racial imbalance does not, however, justify the transfer policy's use of race as a factor to determine eligibility for transfers.[22]

The fact that the "County engages in periodic review ... [and the] diversity profile for each school is reviewed and adjusted" each year to avoid the facilitation and the creation of a racially isolated environment does not make the policy narrowly tailored. *See Eisenberg,* 19 F. Supp. 2d at 455. Instead, it manifests Montgomery County's attempt to regulate transfer spots to achieve the racial balance or makeup that most closely reflects the percentage of the various races in the county's public school population. Periodic review does not make the transfer policy more narrow. Similarly, because a student may be granted a transfer request because he can demonstrate a unique personal hardship[23] does not limit or narrow the transfer policy so that racial balancing is suddenly a narrow fit to achieve diversity. It is true that the racial/ethnic background is not the only factor in transfer request considerations, however, in Jacob's situation, his race was the only factor that led to the denial of his request. Montgomery County admits that it denies transfer requests solely on the basis of race, absent personal hardship, "where the consideration of

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22 Montgomery County is not required to grant transfers, but nonetheless, it may not refuse to grant such requests to achieve a racial makeup in each school mirroring the county's racial makeup.

23 The personal hardship exemption, among other things, refers to allowing a transfer to keep siblings in the same school and ease the burden on families.

the racial/ethnic diversity factor is reached" and the transfer would contribute to racial isolation. County Br. at 8.

In *Tuttle,* one of the reasons for holding that the admissions policy in question in that case was invalid was that it "skew[ed] the odds of selection in favor of certain minorities." No. 98-1604, slip op. at 15 (4th Cir. Sept. 24, 1999). The Montgomery County transfer policy does not allow every applicant for a transfer to be eligible for every available spot. Here Rosemary Hills was stable and was not overutilized and Glen Haven was stable and overutilized, yet spots at Rosemary Hills were foreclosed to Jacob simply because Glen Haven's percentage of white school population would decrease, which would cause a greater departure from the countywide percentage for the white student population. If Jacob had been African-American or Asian or Hispanic, he would have been granted his transfer request from Glen Haven to Rosemary Hills because his transfer would not have caused a racial imbalance at Glen Haven. It does not matter that, as the County argues, "at some schools, African-Americans are generally not allowed to transfer out" and that the "policy does not single out whites, African-Americans, or other minorities," a denial of transfer to African-Americans or other minorities on account of their race is no less unconstitutional than the denial to Jacob was here. An example makes clear the evil of the system in place. Suppose an African-American and an Hispanic student at Travilah Elementary School (J.A. 20) wanted to transfer to Rosemary Hills (J.A. 20) to participate in the magnet program of math and science and get a better education. Their diversity profile numbers being category 3, the same as Jacob's, their transfers would likewise have been refused because of their race. The fact that these two theoretical students would have been unconstitutionally denied a transfer does not ameliorate the fact that Jacob's denial was invalid. As Justice Scalia put it in his concurring opinion in *Adarand:*

> Individuals who have been wronged by such unlawful racial discrimination should be

> made whole; but, under our Constitution, there can be no such thing as either a creditor or debtor race. That concept is alien to the Constitution's focus upon the individual....

515 U.S. at 239.

V.

To summarize, Montgomery County's transfer policy here in question is engaging in racial balancing, which we have just held to be unconstitutional in *Tuttle.* In *Tuttle,* No. 98-1604, slip op. at 13 (4th Cir. Sept. 24, 1999), and *Podberesky v. Kirwan,* 38 F.3d 147, 160 (4th Cir. 1994), we also held that racial balancing was not a narrowly tailored remedy. Therefore, even if we went no further, the complained of action on the part of Montgomery County would have to be invalidated because it was giving effect to an unconstitutional policy.

But that is not all. Added to the racial balancing is the fact that Jacob's transfer request was refused because of his race. As we have pointed out, such race based governmental actions are presumed to be invalid and are subject to strict scrutiny. Nothing in this record overcomes that presumption.

On remand the district court will forthwith enter its preliminary injunction requiring the school authorities in Montgomery County to admit Jacob to the Rosemary Hills Elementary School magnet program to which he had applied. Following that, the district court will enter its final injunction requiring the school authorities in Montgomery County to reconsider the application of Jacob to transfer to the Rosemary Hills Elementary School magnet program without consideration of his race. Such consideration will re-examine that request for admission "as of the date it was made." *Podberesky II,* 38 F.3d at 162.

We are justified in requiring the entry of an injunction finally disposing of this case without an evidentiary hearing because the record clearly establishes the plaintiff's right to an injunction and such a hearing would not have altered the result. *See Lone Star Steakhouse & Saloon v. Alpha of Virginia,* 43 F.3d 922, 938 (4th Cir. 1995). This is so because no fact on which we have based our opinion is challenged and in this case we have the compound constitutional wrongs of an invalid racially based transfer policy sustaining invalid racial balancing.

Our decision is very narrow. We feel that we should point out what is not decided. See *Loving v. Alexander,* 745 F.2d 861, 867 (4th Cir. 1984). We have not enjoined any aspect of the transfer policy of Montgomery County except that it may not consider the race of the applicant in granting or denying the transfer. We have not decided that diversity, as the term is used here, either is or is not a compelling governmental interest. The absence of any rigid academic qualifications for transfer and selection by lot if a surplus of applications, for example, seem to open the opportunity to transfer to magnet schools to all students in the system, without respect to their race or any other qualification except their implicit desire to obtain a better education. Desire is not race based. Nothing in this record would indicate that the other aspects of the transfer policy-stability, utilization, enrollment and personal hardship-are race based, and we do not disturb them.

REVERSED AND REMANDED WITH INSTRUCTIONS

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

JEFFREY EISENBERG, et al., Plaintiffs,	:	
v.	:	CIVIL ACTION NO.: AW 98-2797
MONTGOMERY COUNTY PUBLIC SCHOOLS, et al., Defendants.	:	

MEMORANDUM OPINION

Presently before the Court is Plaintiff's Motion for Preliminary Injunction. The Court, having considered the motion, the opposition thereto, the arguments of counsel at a hearing in open court, and the entire record, finds that the motion must be denied.

Facts

Plaintiffs Jeffrey Eisenberg and Elinor Merberg bring the present action on behalf of their minor son, Jacob Eisenberg. Jacob is presently in the first grade. Based upon the residence of the family, Jacob is scheduled to attend Glen Haven Elementary School in Montgomery County, Maryland.

The Montgomery County Public Schools ("the District") administers a number of magnet programs in various schools, for among other purposes, to achieve racial diversity in the public schools of the county. The magnet programs offer

enriched curricula. The District has established a math and science magnet program at Rosemary Hills elementary school. The District serves over 125,000 children enrolled at over 183 schools.

The District permits voluntary transfers among its schools. It publishes a transfer booklet which sets forth its policies with regard to transfer approval. Five factors are considered: school stability, utilization/enrollment, diversity profile, and the reason for the request. For the 1998-99 academic year, the District received 3,500 applications for transfer. The majority were granted. Approximately 570 appeals were filed of denials.

On March 30, 1998, the Eisenbergs submitted a request for transfer within the school district to Rosemary Hills Elementary School. The stated reason for the transfer request was that at Rosemary Hills, "we believe the school environment and curriculum offer [Jacob] the best opportunity for realizing his personal and academic potential." On the form, Jacob was identified as a white student.

On May 15, 1998, the transfer was denied. The only reason provided for the denial was "impact on diversity." A timely appeal was filed on May, 28, 1998. Jacob's kindergarten teacher wrote a letter in support of the transfer appeal. A letter of denial was issued on August 6, 1998. Eisenberg next appealed to the Board of Education. This subsequent appeal was also denied.

According to the District, Glen Haven is overutilized and/or enrolled. Based upon the "diversity profile," white students are listed under the category: "No transfers out, transfers in permitted (unless overutilized)." The racial makeup for Glen Haven is 24.1% white, 40.5% African-American, 25% Hispanic and 10.1% Asian, compared to a county-wide enrollment of 53.4% white, 20.3% African-American, 13.2% Hispanic and 12.7% Asian. The white enrollment at Glen Haven dropped from 38.9% in 1994-95 to 24.1 in 1997-98. In anticipation of the 1998-99

school year, 19 white students applied for transfer from Glen Haven. Of these students, 5 transfers were approved on personal hardship grounds, and 4 because siblings were already attending the requested school.

Montgomery County has never been under court order to desegregate its schools.

Mr. Eisenberg, acting pro se, now brings the instant action on behalf of his son seeking declaratory and injunctive relief, as well as damages, under 42 U.S.C. § 1983, for claimed violations of his constitutional rights, and under 42 U.S.C. § 2000(d). Now before the Court is Eisenberg's motion for preliminary injunction, seeking to order the District to admit Jacob to Rosemary Hills.

Discussion

A preliminary injunction is an extraordinary remedy that only should be issued when the Plaintiff clearly establishes its entitlement to such relief. See Manning v. Hunt, 119 F.3d 254, 263 (4th Cir. 1997). The standards for injunctive relief in the Fourth Circuit are well known. In Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Manuf. Co., Inc., 550 F.2d 189 (4th Cir. 1977), the Fourth Circuit explained that the most important factors a district court must consider in deciding whether to grant injunctive relief are the threat of irreparable harm to the plaintiff should the Court not issue an injunction, and the likely harm to the defendant if an injunction is ordered. See id. at 196. The district court's first task is to balance these two factors. See Manning, 119 F.3d at 263. After doing this balancing, the court may then consider the third factor, which is the plaintiff's likelihood of success. See id. As the balance of harm moves in favor the defendant, the plaintiff has a greater burden in showing its likelihood of success. See id. Finally, the Court considers the fourth factor, the public interest. See id.

A. BALANCING OF HARDSHIPS

Eisenberg claims a violation of his son's constitutional rights. He maintains that, if proven, his injuries constitute per-se irreparable harm. Eisenberg is correct. *See* Johnson v. Bergland, 586 F.2d 993, 995 (4th Cir. 1978); Henry v. Greenville Airport Comm'n, 284 F.2d 631, 632-633 (4th Cir. 1960). The irreparable harm must nonetheless be balanced against the harm to the District. *See* Johnson, 586 F.2d at 995. In this case, the irreparable harm to Eisenberg is slight. He is not being denied access to education - the evidence is that he can receive a very comparable education at Glen View. Moreover, there is substantial potential harm to the District. Given the similarity between Eisenberg's transfer request and the requests of many other students that were denied, the District would likely be unable to deny transfers to any other student should Eisenberg obtain the relief he seeks. As explained later in this Opinion, the possibility that the transfer policy will lead to racial isolation among certain schools in the District is appropriately of paramount to concern to the District, and the inability to prevent this occurrence obviously imposes a hardship. On balance, it appears to the Court that the balance of hardships slightly favors the District. Accordingly, Eisenberg must make a strong showing of a likelihood of success to prevail.

B. LIKELIHOOD OF SUCCESS ON THE MERITS

The Court cannot conclude, however, that the instant action has a strong likelihood of success on the merits. The question presented is as follows: can the District can take race into account in deciding whether to approve voluntary transfer requests within Montgomery County?

Because "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination," Palmore v. Sidoti, 466 U.S. 429, 432 (1984), when government actors take race into account in their decision-making, such racially conscious decisions are subject to exacting scrutiny by the courts. A challenged

policy or decision can survive such "strict scrutiny" review only if it is justified by a "compelling governmental interest" and is "narrowly tailored" to accomplish that goal. Richmond v. Croson, 488 U.S. 469, 493 (1989) (plurality opinion).

The District has advanced two interests which it maintains are sufficiently compelling to justify their policy: avoiding the creation, through District action, of segregative enrollment patterns that might themselves constitute violations of the law, and the promotion of a diverse student population.

The Court will first address the second stated interest. Eisenberg maintains that the diversity interest, standing alone, is not a "compelling governmental interest" - he argues that the only interest sufficient to justify efforts to maintain racial diversity is a history of prior discrimination, which has not been alleged by the District. Citing to Croson, Eisenberg contends that "defendants must demonstrate that its own 'prior discrimination' justifies implementation of the diversity plan." But in Croson, the defendants did not rely upon an interest in diversity to justify the affirmative action plan there considered. *See* Croson, 488 U.S. at 477 ("The plan declared that it was 'remedial' in nature, and enacted 'for the purpose of promoting wider participation by minority business enterprises in the construction of public projects' "). Likewise, the decision of the Fourth Circuit in Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994), which Eisenberg also cites for the proposition that a remedial purpose is the only legitimate purpose which may justify the District's actions, never decided the question of whether diversity is a sufficiently compelling interest. See Podberesky v. Kirwan, 956 F.2d 52, 56, fn. 4 (4th Cir. 1992) (opinion before remand) ("[t]he district court did not cite the need for diversity for this program, and it does not appear that UMCP established that the Banneker Program was established with this goal in mind"); *see also*, Alexander v. Estepp, 95 F.3d 312, 316 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 1425 (1997) (striking down affirmative action program relying upon

diversity as well as remedial interests, concluding that "even assuming, arguendo, that the asserted interests are compelling, the program is not narrowly tailored"); Maryland Troopers Ass'n v. Evans, 993 F.2d 1072, 1075 (4th Cir. 1993) (reviewing district court finding that "[statistical] evidence of racial discrimination offered by the [defendants] was sufficient to warrant a race-conscious remedy"); Hayes v. North State Law Enforcement Officers Association, 10 F.3d 207, 213 (4th Cir. 1993) (declining to decide whether diversity remains a sufficiently "compelling" rationale).

The Court believes that the diversity interest remains a compelling governmental interest in the context now being considered. In Regents of the University of California v. Bakke, 38 U.S. 265 (1978), a case where the High Court passed upon an affirmative action program at a state-sponsored medical school, Justice Powell wrote that "the attainment of a diverse student body . . . [is] clearly a constitutionally permissible goal for an institution of higher education." Id. at 311-312. This was so for many reasons, including the fact that "[a] great deal of learning occurs informally . . . through interactions among students of both sexes; of different races, religions and backgrounds . . . ." Id. at 312, fn. 48. The importance of a diverse learning environment is at least as important in the context of public grade-school education. "Public secondary schools are of singular importance in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." Wessmann by Wessman v. Boston School Committee, 996 F.Supp. 120, 128 (D.Mass. 1998) (quotation omitted).

While Eisenberg points out that Justice Powell did not enjoy the support of any other Justice with respect to his view in Bakke that diversity is a sufficiently compelling interest, it should be noted that this view has not been ignored by the other members of the court. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 287, 286 (1986) (O'Connor, J., conc.) ("a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the

context of higher education, to support the use of racial considerations in furthering that interest"); Id. at 306 (Marshall, J., joined by Brennan and Blackman, JJ., dissenting) ("the state purpose of preserving the integrity of a valid hiring policy - which . . . sought to achieve diversity . . . for the benefit of *all* students - was sufficient, in this case, to satisfy the demands of the Constitution"); Id. at (Stevens, J., dissenting) ("[i]n the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by a [non-diverse] faculty"). The Court deems the authority more than sufficient to conclude that diversity may be a compelling governmental interest.

Although Eisenberg does cite authority for the proposition that diversity is not a sufficiently compelling governmental interest, Hopwood v. Texas, 78 F.3d 932 (5th. Cir), *reh'g en banc denied*, 84 F.3d 720 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996); Tito v. Arlington County, Civ. Action No. 97-540 A (E.D.Va. 1997), the Court must respectfully disagree with the conclusion reached by those courts. *See* Wessmann, 996 F.Supp. at 130 (describing the criticism of Hopwood decision).

The District also cites its interest in avoiding the creation, through its own action, of segregative enrollment patterns that might themselves constitute violations of the law. This interest is clearly sufficiently compelling to justify the questioned policy. The District is not required to permit transfers among schools within its district. In allowing the transfers, the District must of course do so without facilitating through its actions private conduct that leads to a discriminatory environment.

The Supreme Court expressed as much in examining a similar circumstance in Croson, 488 U.S. 469. In Croson, a case dealing with the implementation of an affirmative action program for minority contractors, the Supreme Court discussed the effect of extremely low minority membership in local contractors associations as demonstrating

discrimination in the industry. "If the statistical disparity between eligible [minority contractors] and [minority contractor] membership were great enough, an inference of discriminatory exclusion could arise. In such a case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market." Id. at 503.

Likewise, extremely low percentages of minorities, or non-minorities, in certain public schools might raise an inference of discrimination. *See* Swann v. Mecklenberg Bd. of Ed., 402 U.S. 1, 26 (1971). The District obviously has a compelling interest in not facilitating a discriminatory environment though state action. *See* Norwood v. Harrison, 413 U.S. 455, 465 (1973) ("[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish").

The question remains whether the policy was narrowly tailored. The District persuasively argues that the program is narrowly tailored to further their interests. The District notes that its policy does not single out whites, African-Americans, or other minorities. For instance, at some schools, African-Americans are generally not allowed to transfer out. At other schools, white transfers are for the most part not approved. At a substantial number of schools, transfers are approved without consideration of the impact on racial or ethnic makeup of the affected schools.

Moreover, the District does not apply hard and fast quotas in deciding transfer requests. It compares the racial composition of the school with that of the County, and where it finds the percentage of a particular group below the County-wide average at a particular school, the District generally denies transfers out of that school. Significantly, the policy is not rigidly applied - transfers out of a school are permitted even for members of underrepresented groups in the case of great need or hardship. For instance, of the 19 white students that applied for transfers out of Glen Haven

for the 1998-99 school year, 9 were permitted to transfer notwithstanding the increasing racial imbalance at the school.

Additionally, given that the purpose of the plan is to ensure racial and ethnic diversity of the schools of the County, the Court cannot conceive of, and Eisenberg does not suggest, any race-neutral alternatives to the policy.

Eisenberg does contend that the program is not narrowly tailored because race is the only factor considered by the County. Eisenberg points out that even in Bakke, Justice Powell stated that "[t]he diversity that furthers a compelling governmental interest encompasses a far broader array of qualifications and characteristics of which racial origin is but a single though important element." Bakke, 438 U.S. at 315. But it must be remembered that Bakke dealt with admissions to medical school. The present case deals with transfers between first grade classes. It is obviously unlikely that first graders will have extensive resumes which may be weighed and considered in addition to their race in the District's formulation of how to craft diverse classrooms. Notwithstanding the lack of classroom experience and other distinguishing credentials of these students, however, the need for a diverse classroom is equal, if not greater, than in later years. Where children first begin to forge social relationships and interactions with their peers, in the view of the Court the need for diversity is at its greatest. And, again, race is not, the only factor taken into account by the District. Given that personal hardship and family unity exceptions are given without regard to the race of the student, and that transfers are only limited where they would contribute to racial isolation and segregation, it is clear that race is not dispositive.

Finally, the County engages in periodic review of the policies to insure that they are as narrow as possible. Each year, the utilization index and diversity profile for each school is reviewed and adjusted. The transfer policies are likewise closely monitored and updated where necessary.

The ultimate question of whether the program is sufficiently narrowly tailored to survive constitutional scrutiny should obviously await further factual development as to how the policy has, in fact, been implemented. However, for purposes of the present motion the Court must conclude that, on balance, the District's policies have been designed as narrowly as possible while still furthering the District's stated interests.

Accordingly, the Court does not believe that Eisenberg can show a likelihood of success on the merits of his motion.

C. PUBLIC INTEREST

The Court must finally give consideration to the impact upon the public interest. Given the previously discussed interest in diversity in the public schools, the Court cannot say that the denial of the preliminary injunction and the maintenance of the District's policy is contrary to the public interest.

Conclusion

Accordingly, for the reasons here stated, Eisenberg's motion for a preliminary injunction will be denied. An Order consistent with this Opinion will follow.

9-4-98
Date

/s/
Alexander Williams, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

JEFFREY EISENBERG, et al., Plaintiffs,	:	
v.	:	CIVIL ACTION NO.: AW 98-2797
MONTGOMERY COUNTY PUBLIC SCHOOLS, et al., Defendants.	:	

ORDER

In accordance with the Memorandum Opinion, IT IS this 4th day of September, 1998, by the United States District Court for the District of Maryland, Southern Division, hereby **ORDERED**:

1. That Plaintiff's Motion for a Preliminary Injunction [2-2] BE, and the same hereby IS, **DENIED**; and

2. That the Clerk of the Court mail copies of this Order to all parties of record.

/s/
Alexander Williams, Jr.
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

JEFFREY EISENBERG, et al., Plaintiffs,	:	
v.	:	CIVIL ACTION NO.: AW 98-2797
MONTGOMERY COUNTY PUBLIC SCHOOLS, et al., Defendants.	:	

DECLARATION OF DR. MARLENE HARTZMAN

1. I am the Director of the Department of Educational Accountability for the Montgomery County Public Schools ("MCPS"). I have held this position since May 1996. I was the Acting Director of the Department of Educational Accountability from July 1995 through May 1996.

2. My undergraduate degree, in Literature, Oral Communications and Education, is from the University of Wisconsin. I also have a Doctoral Degree in Educational Administration from Virginia Polytechnical Institute.

3. As Director of Educational Accountability, I have responsibility for conducting and monitoring implementation of the student transfer policy. While the Board of Education sets policy with respect to student transfers and assignment, I have had substantial involvement, along with my supervisors in the MCPS administration, in implementing the policy and in advising the Board on student enrollment policy issues.

4. MCPS provides educational programs to over 125,000 children enrolled at 183 schools. The system's schools are spread over approximately 500 square miles.

5. In general, students in the District are assigned to school based on their residence. The District generally establishes and maintains attendance area boundaries around schools. Students who reside within those boundaries attend the school appropriate for their grade within their attendance area, unless they are assigned through a special process, such as through a transfer or a special education placement process that requires a placement at a different school.

6. I have verified that the attendance area elementary school for the address of 11015 Cone Lane in Silver Spring is Glen Haven Elementary School, which is within a few blocks of the Cone Lane address. Glen Haven enrolls students in grades pre-kindergarten through five. Jacob Eisenberg has been enrolled as a first grader at Glen Haven for the 1998-99 school year.

7. Glen Haven Elementary School is part of the Albert Einstein High School cluster of schools. A cluster is the term the District uses for a group of one high school and the elementary and middle schools that send students to that high school. Schools in a cluster are located in the same general geographic area. The Albert Einstein cluster is located in the southeastern part of Montgomery County.

8. Exhibit 1 to the Plaintiffs' Complaint in this action consists of the "MCPS School Transfer Information Booklet" for 1998-99, which provides guidance to parents on MCPS' transfer process and policy for applications received in the 1997-98 school year for assignments for the 1998-99 school year, and the current MCPS Regulation JEE-RA on "Transfer of Students." As described in these documents, transfer requests are "batched" or grouped so that the District can evaluate the accumulated impact of the requests to transfer in and out of various schools. Each individual request also is reviewed for the impact of the request on school stability, building utilization, enrollment, racial/ethnic diversity, and

the reason for the request. The District does consider unique personal hardships even where a proposed transfer would be contrary to factors such as building utilization or the diversity profile.

9. Each year, the District develops a diversity profile for each school. This profile compares the racial/ethnic composition of each school to the average County-wide range for that racial/ethnic group, and examines past increases and decreases in that group's population at the school. The diversity profiles are updated annually. A new transfer booklet with updated information on schools is published each year. Diversity profiles are employed in the transfer consideration process to avoid the granting of transfers that would contribute to conditions of racial isolation at schools. Through this process, for example, when the District sees a pattern of white enrollment decline in a school that is below the range of average County-wide enrollment of white students, the District is able to avoid approval of transfers of white students that would contribute to that school declining even further from the County-wide average white enrollment and becoming racially isolated. This process also applies to enrollment of minorities. Thus, if the District sees a pattern of declining African-American enrollment in a school that is below the range of County-wide enrollment of African-American students, the District can avert additional African-American transfers that would contribute to racial isolation.

10. As explained in the MCPS Student Transfer Information Booklet, the race of a student seeking a transfer is only considered if the proposed transfer would contribute to racial isolation at either the sending or receiving school. Racial isolation is considered because "[e]ducation is most effective in a diverse, integrated setting." Thus, one of the purposes of the MCPS transfer policy is to avoid school district action that promotes racial isolation of schools through approval of voluntary transfers from normal attendance zones. For most MCPS schools, race is not a factor at all in considering transfers.

11. Under MCPS' transfer policy, the same standards and procedures apply regardless of the student's race. Thus, neither whites nor non-whites receive different treatment. Whether a transfer will be permitted under the "racial/ethnic diversity" factor depends on the annual MCPS analysis of each schools' existing enrollment and recent trends, the race of the students requesting transfers, the number of students requesting transfers, and the individual reasons advanced in support of the request.

12. Under MCPS' transfer policy, the policy is to be reviewed on an ongoing basis, and has been revised several times since it was first developed.

13. In recent years, the District receives and reviews annually thousands of applications for voluntary transfers between MCPS schools. For the 1998-99 academic year, from February through July 1998, transfer applications for approximately 3,500 students were received. Thus far, the majority have been granted. As of August 17, 1998, MCPS had received and processed 570 appeals of denials of transfer requests.

14. For transfer applications received in the 1997-98 school year for assignments to become effective for 1998-99, Glen Haven Elementary School was given a diversity profile of 1 for African-American and Hispanic students and 3 for white students. This means that African-American and Hispanic students generally were permitted to transfer out but not in, and that white students generally were not permitted to transfer out but were permitted to transfer in to Glen Haven. This is the case because the enrollment at Glen Haven in 1997-98 was 24.1% white, 40.5% African-American, 25% Hispanic and 10.1% Asian, compared to County-wide enrollment for 1997-98 of 53.4% white, 20.3% African-American, 13.2% Hispanic and 12.7% Asian. The white enrollment at Glen Haven has dropped from 38.9% in 1994-95 to 24.1% in 1997-98.

15. For the 1997-98 school year, the racial/ethnic composition of Rosemary Hills was 66% white, 15.9% African-American, 13.8% Hispanic and 4.1% Asian.

16. In anticipation of the 1998-99 school year, 19 white students applied for transfers from Glen Haven Elementary. As of July 30, 1998, five of those students were allowed to transfer on personal hardship grounds, four because older siblings were already at the requested elementary school.

17. It is my understanding that the Montgomery County Public Schools have never been under court order to desegregate. While I was not employed by the District until approximately 24 years after the Brown v. Board of Education decision in 1954, I have always understood that the District voluntarily dismantled segregated schools after that decision.

18. It is my understanding that, in 1980, parent complaints were made to the Office for Civil Rights of the Department of Education concerning the high African-American enrollment at Rosemary Hills and whether transfers approved by MCPS were a cause of the increasing proportion of African-Americans enrolled at that school. The monitoring of transfers for racial/ethnic impact was initiated in response to that concern, as part of an agreement with OCR. See Attachment 1 to this Declaration.

19. On March 30, 1998, Elinor Merberg, the mother of Jacob Eisenberg, submitted a "Request for a Student Transfer from the Home School," seeking to transfer Jacob's first grade assignment from Glen Haven Elementary School to Rosemary Hills Elementary School in the Bethesda-Chevy Chase area. Jacob was identified as white on the Request form. The Eisenbergs claimed no personal hardship in support of the transfer request.

20. MCPS considered but denied the transfer request for Jacob Eisenberg. The transfer and others were denied on the basis of adverse impact on diversity at Glen Haven. Jacob Eisenberg's parents appealed the denial of the transfer

request dated May 28, 1998, which MCPS received that same day. The parents were interviewed as part of the appeal process, as were personnel at Glen Haven and Rosemary Hill. A written report was developed, and the parents were informed by telephone on July 14, 1998, that the transfer was denied. Exhibit 4 to the Complaint is Superintendent Paul L. Vance's August 6, 1998 letter confirming that denial.

21. Jacob Eisenberg's parents appealed Superintendent Vance's decision to the Board of Education of Montgomery County, by letter dated August 7, 1998. The Board is scheduled to consider the appeal at its meeting on August 26, 1998. The first day of school for the 1998-99 school year for public school students in Montgomery County is August 31, 1998.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on August 21, 1998. /s/

Dr. Marlene Hartzman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

JEFFREY EISENBERG, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Civil No. AW-98-2797
MONTGOMERY COUNTY	)	
PUBLIC SCHOOLS, et al.,	)	
	)	
	)	
Defendants.		

DECLARATION OF DR. MARY HELEN SMITH

1. I am currently the associate superintendent of the Office of Instruction and Program Development and have been for the past three years. I have been the Director of the Department of Student, Community and Staff Support for the Montgomery County Public Schools ("MCPS") and the Department of Educational Accountability. I have been employed by MCPS for over 28 years. I began my career in elementary and secondary education at MCPS as a secondary English teacher. I was promoted to Assistant Principal and Principal positions beginning in 1978. In 1983, I was promoted to a supervisory position in one of the MCPS area offices. I served in area offices until 1991, including six months in the area office that serves the part of Montgomery County in which Glen Haven and Rosemary Hills Elementary Schools are located. All of my positions in area offices involved responsibilities for instructional services and support to schools. I became the Director of the Department of Curriculum and Instruction for all of MCPS in 1991.

2. My undergraduate degree is from the University of Maryland. I also have a Master's Degree in English Education from the University of Maryland and a Doctorate in Education with a major in Human Development from the George Washington University.

3. Both in my present position and as Director of the Department of Curriculum and Instruction, I have become fully familiar with the curriculum offered at schools throughout MCPS. All MCPS elementary schools offer the same core curriculum designed to provide an appropriate education for that grade level and to achieve advancement to higher grade levels.

4. As Director of the Department of Student, Community and Staff Support, I had responsibility for developing policy recommendations and procedures relating to community outreach and staff development. I was responsible for using data to analyze program needs and effectiveness, including decisions about allocation of resources to schools.

5. The District has a magnet school program designed to attract students on a voluntary basis to schools outside of their attendance areas and to maintain resident population. Magnet schools offer a specialized curriculum focus or method of instruction to attract parents to enroll and retain their children in those schools. Magnet programs are designed and located in an effort to avoid racial isolation of students in schools by attracting and/or retaining diverse student enrollment on a voluntary basis to schools outside of the area in which students live. Rosemary Hills is a magnet elementary school located in the Bethesda-Chevy Chase area that serves students in grades Prek-k through 2. One of the magnet themes at Rosemary Hills Elementary is science and math.

6. Glen Haven and Rosemary Hills elementary schools provide the same core curriculum. While there is a focus on science and mathematics at Rosemary Hills, and the school has used its discretionary funds for computers and other technology to support the science and mathematics theme, Glen Haven is one of the MCPS elementary schools that will feature a Reading Readiness focus for 1998-99. Extra staff are being provided at Glen Haven to support a student:teacher ratio of 15:1 in daily reading classes. Glen Haven and Rosemary Hills both provide solid, comprehensive and high quality elementary school programs. I have spoken with the Principal of Glen Haven, Dr. Jevoner Adams, and provided her with the information about Jacob attached to the Complaint. We both are confident that Jacob will have a highly successful academic start at Glen Haven.

7. The leadership of MCPS has considered very carefully the educational grounds for avoiding racial isolation and promoting diversity in MCPS schools. I have been part of many such discussions. Children in MCPS live in a community with children of varied racial and national origin backgrounds. MCPS takes very seriously its obligation not to contribute, through granting transfers, to increasing the racial isolation of schools that already are not representative of the County enrollment. I believe, and this view is shared by the Board of Education and leadership of MCPS, that education of children in racially isolated circumstances limits their future functioning in interracial settings and does not adequately prepare them for the real world of the future in which they will have to function.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on August 20, 1998. /s/

Dr. Mary Helen Smith

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

JEFFREY EISENBERG, et al., Plaintiffs,	:	
v.	:	CIVIL ACTION NO.: AW 98-2797
MONTGOMERY COUNTY PUBLIC SCHOOLS, et al., Defendants.	:	

ORDER

In accordance with the decision dated October 6, 1999 of the United States Court of Appeals for the Fourth Circuit, and for the reasons set forth therein, IT IS this 3rd day of December, 1999, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That Plaintiffs' motion for a preliminary injunction requiring the school authorities in Montgomery County to admit Jacob Eisenberg to the Rosemary Hills Elementary School magnet program to which he had applied [2-2] BE, and the same hereby IS, **GRANTED**;

2. That Plaintiffs' demand for a final injunction requiring the school authorities in Montgomery County to reconsider the application of Jacob Eisenberg to transfer to the Rosemary Hills Elementary School magnet program without consideration of his

race BE, and the hereby IS, **GRANTED**, and that such consideration will re-examine that request for admission as of the date it was made;

3. That the Clerk of Court mail copies of this Order to all parties of record.

/s/
Alexander Williams, Jr.
United States District Judge

APPENDIX E

Choice Legislation

Arizona: Ariz. Rev. Stat. § 15-816.01 (1991 & Supp. 1999).

Arkansas: Ark. Code Ann. § 6-18-206 (1999).

California: Cal. Educ. Code § 482909.1 (West 1993).

Colorado: Col. Rev. Stat. § 22-36-101 (1998).

Delaware: Del. Code Ann. tit. 14, § 401 (1993 & Supp. 1998).

Idaho: Idaho Code § 33-1402 (1981).

Iowa: Iowa Code Ann. § 282.18 (West 1996 & Supp. 1999).

Massachusetts: Mass. Gen. Laws Ann. ch.76, § 12B (West 1996 & Supp. 1999).

Minnesota: Minn. Stat. § 124D.03 (West 1993 & Supp. 1999).

New Jersey: N.J. Stat. Ann. § 18A:7F-3 (1999).

North Dakota: N.D. Cent. Code § 15-40.2-02 (1993).

Tennessee: Tenn. Code Ann. § 49-6-3104 (1996 & Supp. 1999).

Utah: Utah Code Ann. § 53A-1a-106 (1997 & Supp. 1999).

Washington: Wash. Rev. Code § 28A.225.220 (1997).

Wisconsin: Wis. Stat. § 118.51 (1999).

Charter School Legislation

Alaska: Alaska Stat. § 14.03.250 (Michie 1998).

Arizona: Ariz. Rev. Stat. § 15-181 (1991 & Supp. 1999).

Arkansas: Ark. Code Ann. § 6-10-116 (Michie 1999).

California: Cal. Educ. Code § 47600 et seq. (West 1995 & Supp. 1999).

Colorado: Colo. Rev. Stat. § 22-30.5-101 (1998).

Connecticut: 36 Conn. Gen. Stat. § 10-66aa (1996 & Supp. 1999).

Delaware: Del. Code Ann. tit. 14, Pt. I, Ch.5 (1993 & Supp. 1998).

District of Columbia: D.C. Code Ann. § 31-2815 (1998).

Florida: Fla. Stat. Ann. § 228.056 (West 1998 & Supp. 2000).

Georgia: Ga. Code Ann. § 20-2-255 (Michie 1996 & Supp. 1999).

Hawaii: Haw. Rev. Stat. § 302A-1182 (1998 & Supp. 1999).

Idaho: Idaho Code § 33-5205 (1981 & Supp. 1999).

Illinois: 105 Ill. Comp. Stat. 5/27A-5 (West 1998).

Kansas: Kan. Stat. Ann. Ch. 72, Art. 19 (1992 & Supp. 1998).

Louisiana: La. Rev. Stat. Ann. § 3971 (West 1982 & Supp. 1999).

Massachusetts: Mass. Gen. Laws ch.71, § 89 (1996 & Supp. 1999).

Michigan: Mich. Comp. Laws § 380.511 (1997 & Supp. 1999).

Minnesota: Minn. Stat. § 120.064 (1993 & Supp. 1999).

Mississippi: Miss. Code Ann. tit.37, ch.28 (1997 & Supp. 1999).

Missouri: Mo. Ann. Stat. § 160.400 (West 1991 & Supp. 1999).

Nevada: Nev. Rev. Stat. § 386.510 (1996 & Supp. 1999).

New Hampshire: N.H. Rev. Stat. Ann. § 194-B:2 (1989 & Supp. 1998).

New Jersey: N.J. Stat. Ann. § 18A:36A-3 (West 1999).

New Mexico: N.M. Stat. Ann. § 22-8A-1 (Michie 1998 & Supp. 1999).

New York: N.Y. Educ. Law § 2853 (McKinney 1998).

North Carolina: N.C. Gen. Stat. § 115C-238.29A (1997).

Ohio: Ohio Rev. Code Ann. § 3314.01 (West 1999).

Oklahoma: Okla. Stat. Ann. tit. 70, § 3-132 (West 1997 & Supp. 2000).

Oregon: 1999 Oregon Senate Bill No. 100 (signed by Governor May 27, 1999).

Pennsylvania: 24 Pa. Cons. Stat. § 17-1701-A (1998).

Rhode Island: R.I. Gen. Laws § 16-77-1 (1996).

South Carolina: S.C. Code Ann. § 59-40-10 (Law. Co-op. 1990 & Supp. 1998).

Texas: Tex. Educ. Code Ann. § 12.101 (West 1996 & Supp. 2000).

Utah: Utah Code Ann. § 53A-1a-502 (1997 & Supp. 1999).

Virginia: Va. Code. Ann. § 22.1-212.6 (Michie 1997 & Supp. 1999).

Wisconsin: Wis. Stat. Ann. § 118.40 (West 1999).

Wyoming: Wyo. Stat. Ann. § 21-3-201 (Michie 1999).

Supreme Court, U.S.
FILED
FEB 9 - 2000
CLERK

(2)

No. 99-1069

IN THE

SUPREME COURT OF THE UNITED STATES

THE MONTGOMERY COUNTY PUBLIC SCHOOLS
and
MEMBERS OF THE
MONTGOMERY COUNTY BOARD OF EDUCATION,
Petitioners,

v.

JEFFREY EISENBERG and ELINOR MERBERG,
on behalf of JACOB EISENBERG,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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24pp

QUESTION PRESENTED

Should the Court grant petitioner's writ of certiorari for a decision that presents no conflict with the decisions of this Court or any court of appeals and is in fact consistent with legal guidance issued by the courts?

CORPORATE DISCLOSURE STATEMENT

Respondent Jacob Eisenberg, and his parents, Jeffrey Eisenberg and Elinor Merberg, are individuals with no parent companies or non-wholly owned subsidiaries to be disclosed pursuant to Rule 29.6.

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INTRODUCTION

This case is about the Montgomery County Public School's (MCPS) use of racial classifications to bar a number of students, including respondent Jacob Eisenberg, from transferring schools within the system solely because of their race. This bar violates the long-established rule set forth by Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265, 318 (1978), that a public policy to promote diversity cannot foreclose the availability of a benefit to an individual simply because the person "was not the right color." Jacob and MCPS agree that school boards need broad discretion to manage their affairs. However, those affairs cannot be administered in an unconstitutional manner as MCPS did here.

The Fourth Circuit reached the straightforward and quite narrow conclusion that MCPS's use of racial bars in its transfer policy was unconstitutional based on uncontroverted evidence and admissions by MCPS that MCPS applies the bar to students of various races across the county.[1] The Fourth Circuit decision is consistent with the one other court of appeals decision that has considered this narrow issue, and further, is squarely within the teachings of this Court. For these reasons, respondent urges the Court to reject this petition for a writ of certiorari. A denial of the petition will give a powerful incentive to those school districts seeking to promote diversity to begin at the earliest possible date to devise lawful policies to achieve this worthy goal.

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[1] MCPS acknowledged in a submission to the Maryland State Board of Education that there are no disputes of material fact in this case (JA 241). MCPS did not identify any unresolved disputes of fact that are material to the disposition of this case in its petition for writ of certiorari. The Fourth Circuit recognized that there are no material facts in dispute. (MCPS App., 17a-18a, 20a.).

STATEMENT OF THE CASE

A. The Transfer Policy

On March 30, 1998, Jacob Eisenberg's parents submitted a request to MCPS to transfer Jacob from his assigned school of Glen Haven Elementary School to Rosemary Hills which offers a math and science magnet program. JA 29.[2] Jacob's parents believed their son had shown an aptitude for math and science and wanted to place him in an academic setting that addressed his aptitude. JA 30, 33. On May 15, the request was denied because of the "impact on diversity" at Jacob's assigned school of Glen Haven. JA 29. The decision was consistent with MCPS' written transfer policy which showed that white students were not allowed to transfer out of Glen Haven. JA 21.

The written transfer policy explained that "[e]ducation is most effective in a diverse, integrated setting." JA 18. Other transfer documents elaborated: "Integrated scholling has inherent education value from the standpoint of education's role in a democratic society. . . . Diversity brings different viewpoints and experiences to classroom discussions and thereby enhances the educational process. . . . Diversity is thus a valuable resource for teaching students to become citizens in a multi-racial/multi-ethnic world." JA 244. In its representations to the District Court, the Board justified its transfer policy on the basis of diversity and avoidance of segregation. JA, 190-91.

MCPS implemented its policy by "develop[ing] a diversity profile for each school. This profile compares

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[2]The "JA" citations are to the Joint Appendix submitted to the Fourth Circuit.

the racial/ethnic composition of each school to the average County-wide range for that racial/ethnic group, and examines past increases and decreases in that group's population at the school." MCPS App. 34a. In March 1998, at the time of Jacob's transfer application, the proportion of white students in the Glen Haven pupil population was 24% compared to 39% in 1994. MCPS App. 35a. The proportion of white students in the county-wide school population was 53% in 1998. *Id.*

MCPS aimed to achieve racial proportionality at each school through magnet programs and racial bars on transfers. "Magnet programs are designed and located in an effort to avoid racial isolation of students in schools by attracting and/or retaining diverse student enrollment on a voluntary basis to schools outside of the area in which students live." MCPS App. 39a. Restrictions on race are imposed on transfers in order to "avoid the granting of transfers that would contribute to conditions of racial isolation at schools." *Id.*

After applying other screening factors to a transfer application, MCPS considers the race of a student seeking a transfer only if the proposed transfer would contribute to racial isolation at either the sending or receiving school. MCPS Br. 5. Still, diversity concerns resulted in the denial of a large number of transfer requests because of race.[3] In 1998, in additon to Jacob, fourteen other students were barred from transferring from Glen Haven because of their race. JA 165. The "student transfer policy and diversity profile system are applied county-wide and are critical to accomplishing the Board's legitimate education interest in promoting racial and cultural

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[3] MCPS disclosed the exact number in response to a discovery request that was not part of the record before the Fourth Circuit.

diversity among the student population." JA 221-22. "[A]t other schools in other parts of the county African-American students and Hispanic students are screened in the same way that Jacob was screened here for his transfer." JA 185-86. For the 1998-99 school year, children could have been barred from transferring because of their race at 69 out of 183 schools in the county. JA 20-22.

B. The District Court and Fourth Circuit Decisions

Jacob's parents appealed the denial of his transfer request. When a response to the appeal was not received one month before the start of the new school year, Jacob's parents filed a complaint and a motion for a preliminary injunction in the U.S. District Court for the District of Maryland. The complaint sought "[a]n order prospectively prohibiting defendants from barring any person on the basis of race from competing for any transfer available through the school system." JA 15.

After considering lengthy briefs and oral argument, the District Court denied the preliminary injunction. The facts of the case were sufficiently developed for the District Court to conclude that MCPS' interest "in avoiding the creation, through its own action, of segregative enrollment patterns . . . is clearly sufficiently compelling to justify the questioned policy." MCPS App. 27a. Jacob appealed the District Court's decision to the Fourth Circuit asking the appellate court to strike down "that portion of the transfer policy that denies transfer requests solely on the basis of race." Appellant's Brief to the Fourth Circuit at 10. The Fourth Circuit characterized the controlling issue before it in this manner: "The issue in this case is whether the Montgomery County Board of Education may deny a student's request to transfer to a magnet school because of his race. We hold that it may

not." MCPS App. 2a. The court, in a decision which it characterized as "very narrow" (MCPS App. 20a), expressly declined to decide whether diversity or avoidance of isolation is a compelling interest. MCPS App. 13a. Further, the Fourth Circuit stated that it was not enjoining any aspect of the MCPS transfer policy except for its consideration "of the race" of the applicant in granting or denying the transfer." MCPS App. 20a.

Nothing about this decision would have prevented MCPS from continuing to offer transfers to magnet programs in a continuing effort to avoid racial isolation. The Fourth Circuit opined: "If racial imbalance occurs in some of the Montgomery County schools because students like Jacob, for example, are permitted to transfer to magnet schools to get a better education, any racial or ethnic imbalance is a product of 'private choices [and] it does not have constitutional implications.' " MCPS App. 16a (*quoting Freeman v. Pitts*, 503 U.S. 467, 495 (1992)).

MCPS did not seek further review of the decision before the Fourth Circuit. It also did not seek a stay of the decision pending further proceedings in this Court. MCPS decided on December 14 to prohibit all previously allowed transfers within the school system except for limited exceptions which are not relevant here.

REASONS FOR DENYING THE WRIT

This Court should deny MCPS' writ because there is no conflict between the Fourth Circuit decision and decisions of this Court and other courts of appeal; because, the Fourth Circuit properly applied this Court's presumption against the use of racial classifications; and, because case law provides clear guidance for school authorities to follow with respect to diversity in the schools.

Because each of MCPS' asserted grounds for review is devoid of factual and/or legal merit, this Court should decline to review the case.

A. There Are No Conflicts Between the Fourth Circuit's Decision and Decisions of This Court and Other Courts of Appeal

The First Circuit is the only circuit court in addition to the Fourth Circuit to consider the narrow issue of the validity of racial bars where diversity has been assumed to be compelling is the First Circuit. In *Wessman v. Gittens,* 160 F.3d 790 (1st Cir. 1998), that court upheld a challenge to an admissions policy at a public school which employed racial classifications that barred some applicants from admission because of their race. The First Circuit understood that it could only determine whether diversity is a compelling interest by paying "particularized attention" to the facts supporting the need for diversity. 160 F.3d at 798.

Like the policy challenged in *Eisenberg,* the policy in *Wessman* focused "exclusively on racial and ethnic diversity". *Id.* The First Circuit ruled that "[n]o more is needed to demonstrate that [the school board] already has run afoul" of the only opinion of this Court to express support for diversity: " 'The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.' " *Id.* (*quoting Bakke,* 438 U.S. at 315).[4]

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[4]Other courts also recently have struck down school admission policies that focused exclusively on racial diversity. See *Brewer v. West Irondequoit Central School District,* 32 F. Supp. 2d 619, 631 (W.D. N.Y. 1999) (on appeal to the Second Circuit and

[footnote continued]

"The Policy does precisely what Justice Powell deemed anathematic: at a certain point, it effectively forecloses some candidates from all consideration for a seat at . . . school simply because of the racial or ethnic category in which they fall." 160 F.3d at 800. In reaching this conclusion, the First Circuit emphasized that it was not deciding whether diversity is a compelling interest, *id.*, as did the Fourth Circuit in its decision.

Jacob and a number of other students were foreclosed from the possibility of transferring schools solely because of their race. The First Circuit analysis in *Wessman* directly supports the result reached by the Fourth Circuit in *Eisenberg.*

None of the cases cited by MCPS demonstrates a conflict with decisions of the Court or decisions from other circuits. MCPS first cites *North Carolina State Bd. of Educ. v. Swann,* 402 U.S. 43, 45 (1971) (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 16 (1971)), for the proposition that "school authorities have wide discretion in formulating school policy, . . . as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." The implication is that school districts may take voluntary, race-conscious action to avoid creating racial isolation, including apparently barring students from a public benefit, such as transfers, solely because of their race. Even though Jacob does not dispute the view that school authorities have and need wide discretion in formulating school policy, nothing in the *Swann* school deseg-

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argued on September 4, 1999); *Wooden v. Regents of the University of Georgia,* 32 F. Supp. 2d 1370, 1382 (S.D. Ga. 1999); and, *Equal Open Enrollment Ass. v. Board of Education of Akron,* 937 F. Supp. 700, 707 (N.D. Ohio 1996).

regation line of cases supports a policy that bars students by race from a public benefit in the absence of a predicate constitutional violation.

Swann arose in a State with a "long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race." 402 U.S. at 5-6. In this context, the Court recognized the power of school boards to use various remedies in combating the long history of discrimination. *Id.* at 16. Justice Powell recognized in *Bakke* that "[t]he school desegregation cases are inapposite" to the question of whether a public school's non-remedial interest in "diversity" justifies racial classifications. 438 U.S. at 300.[5] MCPS is a unitary school system lacking the history of discrimination to support the extraordinary remedies upheld by this Court in *Swann*.

In addition, *Wygant v. Jackson Board of Education*, 467 U.S. 267 (1986), has no bearing on the MCPS transfer policy at issue here.[6] Nothing in Justice O'Connor's

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[5]See also *Wessman v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998): "The Swann Court had no occasion to consider the question, central to this appeal, of whether and to what extent the Constitution circumscribes school officials' discretion to formulate and implement an admissions policy that embraces a particular brand of pluralism."

[6]Similarly, nothing in *Crawford v. Board of Educ. of City of Los Angeles*, 458 U.S. 527 (1982), addresses the validity of race-conscious action that bars an individual from a government benefit under the U.S. Constitution. *Bustop, Inc. v. Board of Educ. of City of Los Angeles*, 439 U.S. 1380 (Rehnquist, Circuit Justice 1978), also did not assess the validity of Los Angeles' bussing plan under the U.S. Constitution. Justice Rehnquist simply denied an application for a stay of the plan because "the complaints of the parents and the children in question are complaints about California state law, and it is in the forums of that State that these questions must be resolved." 439 U.S. at 1383.

statement that states may take voluntary race-conscious action addresses the intersection of that action with a denial of a public benefit to individuals solely because of their race. 467 U.S. at 291.

Washington v. Seattle School District No. 1, 458 U.S. 457 (1982), creates no more of a conflict with the Fourth Circuit decision that does *Swann* or *Wygant*. *Seattle School District* involved a challenge to the constitutionality of a state referendum which sought to overturn a plan to use mandatory bussing by Seattle to achieve racial integration in the public schools. The Court characterized the referendum as "remov[ing] the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body, in a way as to burden minority interests." 458 U.S. at 474. The Court concluded that the referendum "must fall because it does 'not attempt to allocate governmental power on the basis of any general principle' " 458 U.S. at 470 (*quoting, Hunter v. Erickson*, 393 U.S. 385, 395 (1969). "Such a structuring of the political process, the Court said, was 'no more permissible thn [is] denying [members of a racial minority] the vote, on an equal basis with others.' " *Id.* (*quoting, Hunter*, 393 U.S. at 391). The Court expressly declined to pass judgment on the propriety of Seattle's plan to achieve integration through the use of race-conscious student assignments. 458 U.S. at 472 n.15. The Fourth Circuit's decision in *Eisenberg* deals with the violation of individual civil rights, not the unlawful structuring of a political process, and is therefore not at odds with this Court's decision in *Seattle School District*.[7]

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[7] Petitioners view the holdings in *Swann*, *Seattle School District*, and *Crawford*, among others, as "consistent with long-

[footnote continued]

Hunter ex. rel. Brandt v. Regents of University of California, 190 F.3d 1061 (9th Cir. 1999), and *Parents Ass'n of Andrew Jackson High Sch. v. Ambach,* 738 F.2d 574 (2d Cir. 1984), MCPS Br. 21, both address issues not presented in *Eisenberg* and therefore present no conflict with the case. *Hunter* involved a University Elementary School (UES) run by UCLA's Graduate School of Education and Information Studies. Race was considered in the admissions process only "in an attempt to obtain an adequate cross-sample of the general population for the purpose of maintaining the scientific credibility of its scientific studies." *Hunter v. Regents of University of California,* 971 F. Supp. 1316, 1320 (D.C. Cal. 1997). The Ninth Circuit found that "[r]esearch is fundamental to the UES' charter" and agreed with the district court that "the defendants' interest in operating a research-oriented elementary school is compelling." 190 F.3d at 1065. The court recognized the need to defer to researchers' decisions about what they need for their research. *Id.* at 1066.

The research function controlling in *Hunter* is simply not present in *Eisenberg.* MCPS has never asserted at any stage in this litigation, including in its petition for certiorari,[8] that racial classifications are employed for

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standing efforts of Congress to achieve the national goal of elimination, reduction or prevention of minority group isolation in elementary and secondary schools." MCPS Br. 16 n.23. Not only are the cited cases not relevant to the use of racial bars by school authorities, but neither is the scope of permissible congressional action relevant to the power of a local school board. Congress has "unique remedial power" under §5 of the Fourteenth Amendment that is simply not available to any other organ of state or federal government. *City of Richmond v. J.A. Croson,* 488 U.S. 469, 488 (1989).

[8]MCPS identifies a number of areas of additional evidence it would like to have submitted in this case at trial. MCPS Br. at 26.

[footnote continued]

promoting research. Evidence entered in this case shows that the use of racial classifications and the implementation of the transfer policy by MCPS was designed to promote diversity and avoid racial isolation at individual schools, which was not the case in *Hunter*. 971 F. Supp. at 1320.

Andrew Jackson High is similarly not on point with the *Eisenberg* decision. The issue in that case was whether a voluntary policy to promote integration was sufficiently compelling to justify excluding some minority students from schools of their choice. *Parents Ass'n of Andrew Jackson High v. Ambach*, 598 F.2d 705, 719 (2nd Cir. 1979). The Second Circuit concluded that such a purpose was compelling, although it never determined whether the policy itself was valid because of an incomplete factual record. 598 F.2d at 720; and, 738 F.2d at 583.

Andrew Jackson High presents no conflict with the *Eisenberg* decisions for a number of reasons. First, the purported conflict turns on that court's opinion which states that promotion of integration is a compelling interest, which is an issue the Fourth Circuit expressly declined to decide. Similarly, the *Eisenberg* decision and this Court's decision whether to review *Eisenberg* is not directly affected by other circuit court decisions which have held that diversity is not a compelling interest.[9]

None of these areas suggest that MCPS considers the use of racial bars in the transfer policy necessary to support a research function of the school.

[9]See *Lutheran Church-Missouri Synod v. Federal Communications Comm'n*, 141 F.3d 344 (D.C. Cir. 1998); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *reh'g en banc denied*, 84 F.3d 720 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

Andrew Jackson High is also not relevant to the *Eisenberg* decision for the important reason that it applied standards of law which have been superceded by subsequent decisions of this Court. Specifically, the Second Circuit ruled that the School Board could take white flight into account in implementing voluntary action to promote integration. 598 F.2d at 720. This broad view of race-conscious action was rejected by this Court in *Freeman v. Pitts*:

> That there was racial imbalance in student attendance zones was not tantamount to a showing that the school district was in noncompliance with the decree or with its duties under the law. Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation.

503 U.S. at 494. Integration can only be pursued as a result of a constitutional violation, not for its own sake as MCPS attempted to do here through its use of racial bars in the transfer policy at issue.[10]

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[10]The Second Circuit also employed an outdated standard for determining whether the race-conscious policy was narrowly tailored to the asserted compelling interest. School authorities were required to show that each component of the transfer plan was "necessary" to achieve the goal of integration. 598 F.2d at 721. The current multiple-pronged test for narrow tailoring was set forth by this Court in *United States v. Paradise*, 480 U.S. 149 (1987).

B. This Court's Presumption against Racial Classifications Was Properly Applied by the Fourth Circuit

MCPS argues that the Fourth Circuit improperly applied the presumption against race-based classifications stated by this Court in *Personnel Administrator of Massachusetts v. Feeny*, 442 U.S. 256 (1979), to shift the burden of proof to MCPS rather than requiring Jacob to demonstrate a violation of his rights. MCPS Br. at 23. However, MCPS makes this assertion without ever showing a willingness in the current petition or in the litigation below to grapple with the key facts which are fatal to its position.

MCPS' transfer policy not only took race into account, it used race to bar transfers for a certain number of students. The use of racial bars is what Jacob challenged, and what the Fourth Circuit characterized as the controlling issue in this case. Jacob retained the ultimate burden of proving the constitutional violation. Proof of the violation was entered in the proceedings through MCPS' own declarations and admissions in court. Jacob met his burden by demonstrating a violation of his rights and those of other students in the Montgomery County school system through the application of the MCPS transfer policy. Consequently, there was no improper shifting of the burden of proof between the parties.[11] MCPS has yet to suggest any evidence that affects the presumption against the racial bar it employed.

MCPS complains that an expedited preliminary injunction proceeding should not "serve as a launch pad" for

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[11] Even if the Fourth Circuit misapplied the *Feeny* presumption, such a misapplication is not a basis for granting certiorari. See Supreme Court Rule 10.

a decision on the merits of a constitutional inquiry calling for careful fact-finding. MCPS Br. 26. However, the additional facts MCPS would have liked to introduce at a trial, *id.*, do not affect the fact that a number of students throughout Montgomery County were barred from transfers solely because of their race.[12] "The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment." *Bakke*, 438 U.S. at 320. The Fourth Circuit correctly noted that it was justified in entering an order for injunctive relief in favor of Jacob without an evidentiary hearing "because the record clearly establishes the plaintiff's right to an injunction and such a hearing would not have altered the result." MCPS App. 20a.

The Fourth Circuit's decision to rule on the merits in reviewing a denial of a preliminary injunction, when viewed in the complete context of the controlling facts and law, is an ordinary function of appellate administration of the law. See *Planned Parenthood of the Blue Ridge v. Camblos*, 155 F.3d 352, 360 (4th Cir. 1998); *Lone Star Steakhouse & Saloon v. Alpha of Virginia*, 43

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[12] Similarly, MCPS' position here is not advanced by its assertion that the Fourth Circuit's conclusion that the transfer policy is administered "with an end toward maintaining [the District-wide] percentage of racial balance in each school" is clearly erroneous. Petitioner's Brief at 25, fn. 26. Putting aside Jacob and MCPS' agreement that racial bars were only instituted within a school after a racial group exhibited a pattern of movement away from the District-wide average over time, nothing about the Fourth Circuit's conclusion changes the fact that a number of students at various schools were denied transfers solely because of their race. If MCPS nevertheless insists that the Fourth Circuit's conclusion was material to its decision, the proper place to seek review of the conclusion was with the Fourth Circuit in the first instance and not with this Court. In any event, Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings."

F.3d 922, 938 (4th Cir. 1995); *Barry v. Bean*, 796 F.2d 713, 718 (4th Cir. 1986). MCPS' unhappiness with the Fourth Circuit's decision to rule on the merits is not a sufficient reason for this Court to prolong litigation of MCPS' "barefaced"[13] violation of civil rights, particularly where the Fourth Circuit's decision is well-grounded in undisputed facts and upon a long-established rule of law.

C. The Fourth Circuit Decision is Squarely Within Existing Judicial Guidance on the Use of Racial Bars

Most fairly read, MCPS' plea before this Court is really one of policy preference and not of law. Its petition does not identify a conflict in law between the cases it cites and the Fourth Circuit's decision. Rather, MCPS relies upon dicta in these cases, taken out of context, to support its policy preference to promote diversity and the avoidance of racial isolation through the use of racial bars. A policy preference is simply not a sufficient basis in law for violating the civil rights of students, or for granting certiorari in this case.

At page 27 of its brief, MCPS argues that the Fourth Circuit decision "forces" it to allow parents "unfettered" opportunity to transfer to another school, thereby contributing to racial isolation.[14] This concern does not

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[13] *Wessman*, 160 F.3d at 800, (*quoting People Who Care v. Rockford Bd. of Education*, 111 F.3d 528, 538 (7th Cir. 1997)).

[14] MCPS cites a number of cases on page 18 of its brief in support of its fear that approving transfers which contribute to racial isolation could invite a legal challenge that MCPS engages in intentional discrimination. MCPS has not suggested in this litigation that it has engaged in intentional discrimination, nor has Jacob alleged that it has. This is an issue for a different lawsuit. In any event, the courts in the cases cited by MCPS all drew a con-

[footnote continued]

merit the slightest attention. MCPS runs a school district that has never been the subject of school desegregation litigation; its implementation of the transfer policy was voluntary. Petitioner's Appendix at 36a, 39a.[15] MCPS could simply continue to operate its schools without the transfer policy and not suffer adverse legal consequences. This Court recognized in *Freeman v. Pitts* that racial balancing is only to be pursued in response to a constitutional violation, and not for its own sake as MCPS did here. 503 U.S. 467.[16]

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clusion of intentional discrimination after identifying a number of factors supporting the conclusion. *Keyes v. School District No. 1*, 445 F.2d 990, 1002 (10th Cir. 1971) ("ample evidence in the record [ ] that race was made the basis for school districting with the purpose and effect of producing substantially segregated schools."); *NAACP v. Lansing Board of Education*, 559 F.2d 1042, 1056 (6th Cir. 1977) (eight separate areas of action by the board together supported "[t]he requisite segregative intent or purpose for a constitutional violation."); *Reed v. Rhodes*, 607 F.2d 714, 735 (6th Cir. 1979) ("massive evidence of intentional discrimination"); *Diaz v. San Jose Unified Sch. Dist.*, 733 F.2d 660 (9th Cir. 1984), involved compliance with a state law requirement to eliminate de facto segregation.

[15]MCPS notes that the transfer policy was instituted in response to a complaint filed by one parent with the Office of Civil Rights (OCR) for the U.S. Department of Education. Petitioner's Br. at 4. What petitioner fails to mention is that OCR concluded that MCPS "is not in violation of Title VI of the Civil Rights Act of 1964" with respect to the allegation made in the complaint. JA 99.

[16]MCPS' view about conflicting guidance in this area of civil rights may be based on its misapprehension of the controlling law. The law does not prohibit racial segregation as MCPS asserts on page 27 of its brief. It only prohibits segregation that is the result of intentional discrimination by state actors as this Court made clear in *Freeman*.

Still, the Fourth Circuit made clear that MCPS was not required to disband the transfer policy to magnet schools, only the use of racial bars in the policy. Such a policy would permit MCPS to continue to use magnet schools to avoid racial isolation. MCPS App. 39a. Like the Fourth Circuit's support for a race-neutral transfer policy to magnet schools, this Court has recognized an explicit distinction "between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters." *Crawford*, 458 U.S. at 538. If MCPS were to reinstitute a race-neutral transfer policy to magnet schools, parental transfer choices would still be constrained by the other non-racial screening factors included in the transfer policy, factors which the Fourth Circuit explicitly did not enjoin. MCPS App. 20a.

This Court and Courts of Appeals have issued consistent guidance in this area of the law. MCPS will make its own decision about how to follow that guidance. MCPS' dissatisfaction with the guidance is not a sufficient reason for this Court to grant MCPS' petition.

CONCLUSION

The Fourth Circuit's decision in *Eisenberg* represents the continuation of a line of cases running from *Bakke* through *Wessmann* which recognizes that public officials may not pursue diversity in such a manner as to foreclose a public benefit to an individual solely because of race. The decision is also consistent with this Court's guidance in *Crawford* and *Freeman*. It is not at odds with any identified court of appeals decision.

Perhaps just as importantly, this case does not present the most important constitutional issue in this area of the law: whether diversity could ever be a compelling interest

for equal protection purposes. The Fourth Circuit had no reason to reach this decision. Even if diversity is a compelling interest, the outcome in this case would still be the same under the standards articulated by Justice Powell in *Bakke*.

MCPS identifies a number of cases that are currently proceeding through the federal courts which might present the question of whether diversity is a compelling interest. MCPS Br. 22, n.25. This important area of the law would be better addressed in a case which squarely considers the question of whether diversity is a compelling interest.

For the foregoing reasons, this Court should deny petitioner's application for a writ of certiorari and let the Fourth Circuit decision stand as part of a consistent and growing body of jurisprudence which supports equal protection of the law for public school students.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 9 2000
CLERK

(3)

No. 99-1069

In the
Supreme Court of the United States

THE MONTGOMERY COUNTY PUBLIC SCHOOLS AND MEMBERS OF MONTGOMERY COUNTY BOARD OF EDUCATION, et al., *Petitioners*,
v.
JEFFREY EISENBERG AND ELINOR MERBERG, ON BEHALF OF JACOB EISENBERG, et al., *Respondents*.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION and American Association of School Administrators, Association of Multi-Ethnic Americans, California School Boards Association, Center for the Study of Bi-Racial Children, the Council of the Great City Schools, Georgia School Boards Association, Horace Mann League, Illinois Association of School Boards, Magnet Schools of America, Maryland Association of Boards of Education, National Alliance of Black School Educators, National Association for Multicultural Education, National Association of Secondary School Principals, North Carolina School Boards Association, Texas Association of School Boards and Washington State School Directors' Association

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This brief is filed with the consent of both parties. Letters of consent are on file with the Clerk of this Court.[1]

INTEREST OF *AMICI*

The National School Boards Association (NSBA) is a nonprofit federation that represents the nation's 95,000 school board members, who in turn serve more than 90 percent of the K-12 students in the nation. NSBA's dedication to the principles of diversity is outlined in its Beliefs and Policies:

> "The United States is a complex, racially diverse society. School boards should take positive action to support integration, provide equality of educational opportunities, and eliminate from educational materials and from district procedures stereotyping of women, minorities, immigrants and migrants. The total school environment, including its curriculum, should reflect the multicultural nature of the world." (Article II, Belief 3.3 Quality Integrated Education)

NSBA has had a long interest in the effective development and implementation of local school board policies including those that set student enrollment standards and procedures in order to promote educational objectives.

The California School Boards Association is a nonprofit association that represents 1,000 public school districts governing boards and county boards of education in the state of California. The Georgia School Boards Association is a nonprofit association that represents the 180 boards of education in the state of Georgia. The Illinois Association of School Boards is a nonprofit association that represents 864 public school boards of education in the state of Illinois. The Maryland Association of Boards of Education is a nonprofit organization that represents all of the state's 24 local boards of education and the Maryland State Board of Education. The North Carolina School Boards Association is a

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[1] This brief was written by the National School Boards Association, who is leading *amici curiae* before this Court, and not in any part by counsel for either party. No person or entity other than NSBA has made a monetary contribution to the preparation or submission of this brief.

nonprofit organization that represents the 117 local school boards in the state of North Carolina. The Texas Association of School Boards is a nonprofit association that represents 1,047 public school boards in the state of Texas.

The American Association of School Administrators is a nonprofit professional organization representing over 15,000 educational executives. Its interest in this case stems from its longstanding commitment to diversity. AASA believes that the interests of children are best served when segregation of social, economic, ethnic and racial populations in schools is diminished.

The Association of Multi-Ethnic Americans is a nationwide, nonprofit confederation of local multiethnic, interracial groups. It was founded in 1988 with the primary goal of promoting positive awareness of interracial and multi-ethnic identity.

The Center for the Study of Biracial Children advocates for the rights of interracial families, biracial children and multiracial people. The Center provides advocacy, training and consulting on behalf of this population, which has unique needs and challenges not addressed by society's institutions.

The Council of the Great City Schools is a coalition of 57 of the largest urban public school systems in the United States. The Council serves more than 6.6 million children in inner city schools around the nation, and about 80.7 percent of the student population are African American, Hispanic, Asian American and other minorities. The Council believes this case is important to the nation's urban schools so that they can remain empowered to reduce racial isolation and to value the richness of their culturally and linguistically diverse student population.

The Horace Mann League was founded by a group of leading educators in 1922. It exists to perpetuate the ideals of Horace Mann, the founder of the American public school system. According to the League's beliefs, our public schools should be free, classless, non-sectarian, and open to all of the children of all of the people. The League believes that the public school system of the United States is an indispensable agency for the perpetuation of the ideals of our democracy and a most necessary unifying and dynamic influence in American life.

Magnet Schools of America is a nonprofit educational organization formed to promote equity, excellence, innovation and

the reduction of minority isolation. MSA's interest is on behalf of the more than 4,200 magnet schools throughout the United States and approximately 1.5 million children attending these innovative and diverse public schools. Specifically, MSA strongly supports the federal grant program and the Magnet Schools Assistance Program, designed to support the desegregation of public schools by supporting the elimination, reduction, or prevention of minority group isolation in elementary and secondary public schools.

The National Alliance of Black School Educators is a nonprofit organization of 5,000 members, constituting the largest network of black educators in the nation. NABSE is dedicated to improving the educational accomplishments of African American youth through the development and deployment of instructional and motivational methods that increase levels of inspiration, attendance and overall achievement.

The National Association for Multicultural Education is the primary membership organization addressing issues of multicultural education throughout the United States. NAME was formed to bring people together from all levels of education, from organizations, businesses and communities, who are committed to achieving education that is multicultural and a society which is fair to all.

The National Association of Secondary School Principals serves more than 42,000 education leaders in middle level schools and high schools, including administrators, teachers, students and others interested in the education and welfare of today's youth.

Washington State School Directors' Association was formed to enhance the coordination of programs and procedures pertaining to policymaking and to the control and management among the school districts in the state. The Association represents all of Washington's 1,482 school board members governing the 296 public school districts in the state.

STATEMENT OF THE CASE

Montgomery County (Md.) Public Schools had a policy which denied students transfers if the transfer would compromise diversity or increase racial isolation in individual school buildings. Pursuant to this policy, Jacob Eisenberg, a white incoming first grader, was denied a transfer to a math-science magnet school. Eisenberg brought an action in federal district court seeking a

preliminary injunction against the policy. The district court ruled in favor of the school's policy. The Fourth Circuit Court of Appeals reversed, ruling in favor of Eisenberg and granting a final decision on the merits.

This case warrants Supreme Court review because it presents a critical legal issue: *Can a local school board take intentional steps to create a diverse learning environment?*

School districts need guidance about how race can be considered when assigning students in elementary and secondary schools. In constitutional law, our public school system is viewed as a unique legal context. Unlike any other setting, the mission of public schools involves not only academic proficiency but a demand that children be prepared to assume their social, civic, democratic and economic responsibilities. As such, this Court has often recognized that the public school context merits special consideration.

Montgomery County (Md.) Public Schools' transfer policy was voluntarily undertaken by a school district with no court-determined history of *de jure* segregation. Thus, this case presents the issue of race and K-12 student assignment without necessarily raising questions of remedial desegregation and court orders.

This Court's acceptance of review is urgent because of conflicts between the circuits and because of the on-going, educational upheaval created by this uncertainty. Faced with vastly conflicting court opinions, school officials are uncertain precisely how to meet the important educational goal of educating children in a diverse setting without violating the law.

SUMMARY OF THE ARGUMENT

Public school districts around the nation have been placed in a legally untenable position. The Fourth Circuit's decision is sure to have a chilling effect nationwide. School leaders need guidance on how they may use race, together with other factors, in granting or denying transfers, or devising overall student assignment plans, or admitting students to magnet schools or special academies.

A U.S. Supreme Court decision is needed to:

A. settle the conflict within and among federal circuit courts.

B. establish specific ground rules for considering race given the special context of student assignment in kindergarten through 12th-grade public schools.
C. reinforce educators' discretion to exercise sound judgments on how best to prepare students for economic success and daily living in the 21st Century.
D. affirm that locally accountable school board members can ratify policies and practices to accomplish the educational benefits of diverse learning environments.

Amici urge this Court to abide by the teachings of *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny. Now, even more than 45 years ago, we understand that "separate ... [is] inherently unequal." [2] In the U.S. today, it is not just that "separate is inherently unequal"; but separate is academically deficient.

ARGUMENT

I. A U.S. Supreme Court decision is needed to settle the conflict within and among circuits and to set a proper standard for evaluating these cases.[3]

Currently, race may or may not be a permissible factor in student assignments, depending on the jurisdiction. Consequently, school administrators and boards of education are essentially chilled from exercising their sound educational judgments on this subject. For each day that passes, a significant portion of the 47 million children in our public schools are deprived of important, first-hand lessons in diversity that would aid each personally and benefit the Nation as a whole.

Part of the confusion stems from the assertion that this issue has been settled by related cases. Those who attack diversity

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[2] *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

[3] Petitioners have aptly described that conflict in their brief. *Amici* incorporate by reference pages 14-22 of the Petition for a Writ of *Certiorari* filed with this Court ("Petition"), which sets forth the conflict among the circuits on this issue.

programs use *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (affirmative action in government contracting; *Richmond v. J.A. Croson*, 488 U.S. 469 (1989) (affirmative action in government contracting); and *Hopwood v. State of Texas*, 78 F.3d 932, *reh'g en banc denied*, 84 F.3d 720 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) (affirmative action in a post-graduate professional degree program) as precedent. The analogy fails, however, because K-12 public education is a unique setting. The precedent set in those cases does not transfer to the facts and circumstances of this case.

The first two cases involve affirmative action programs in government contracting, not K-12 education. The *Hopwood* decision struck down the use of race as an admission criterion for the University of Texas School of Law – a graduate school program.

The use of *Adarand* and *Croson* as precedent in K-12 student assignment cases is inappropriate for at least two reasons. First, both decisions occur in the context of affirmative action. The challenged practices in both cases involve the same approach: providing a special advantage for racial minorities in obtaining a government benefit (subcontracting opportunities) as a means of compensating for past discrimination.[4] By contrast, schools are seeking to diversify the classroom because of the inherent value of a diverse learning environment, rather than as a remedy for past injustices. As such, the goal is to provide educational benefits to all children, regardless of race. Ensuring a diverse learning community by considering race, among other factors, is simply one educational tool that school boards and administrators employ to provide a well-rounded education. Second, the line of cases developed in the context of government hiring practices is not applicable to the K-12 context (*See infra*, part II). Given the

[4]In both cases Justices were concerned about conditioning a government benefit on racial classifications. With school diversity, there is no mechanical or systemic access to or denial of a benefit based on race. Children of all races will receive a free appropriate public education. The only issues in a case such as this is where the benefit will be provided. Given these stark differences, it is questionable whether *Adarand* and *Croson* apply and even whether strict scrutiny should be invoked.

significant differences between public elementary and secondary education and *Adarand* and *Croson*, the holding and reasoning in those cases are not dispositive of issues raised here.

Hopwood is a higher education case – again, a decidedly different context than K-12 education. In *Hopwood*, admission to a prestigious law school is at stake. The university's stated aim was to increase the number of minority law students through an affirmative action program that granted preference to minority candidates. By contrast, Montgomery County's program is motivated by the educational benefit of diversity and the harms of racial isolation,[5] and does not prioritize benefits based on race. In this situation, the student was already admitted to the public schools;[6] the school system's decision as to which school he should attend was part of an overall strategy to prepare every student for life's opportunities and challenges by ensuring diversity and guarding against racial isolation.

School systems, trying in good faith to abide by current law, are met with a tangled web of contradictory rulings.[7] A

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[5] Indeed, voluntary programs such as the one in Montgomery County Maryland are aligned with federal priorities expressed in the Magnet Schools Assistance Act, 20 U.S.C. § 7201. "[I]t is in the best interest of the Federal Government to ... continue the Federal Government's support of school districts implementing court-ordered desegregation plans and school districts *voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds*, beginning at the earliest stage of such students' education." (emphasis added).

[6] While admission to a particular law school might be viewed as a once-in-a-lifetime opportunity, the student in Montgomery County Maryland is already admitted to the system and benefits from the high quality curriculum offered at his assigned school. He also benefits generally from being privy to overall district offerings – a district that maintains one of the highest per pupil expenditures in the nation. Here, Jacob Eisenberg is merely requesting access to the educational benefits at a particular location. Setting attendance area boundaries and similar assignment policies are decisions traditionally reserved for school board authority and responsibility.

[7] Ironically, the only uniformity among the race and student assignment cases is the refusal to apply the full constitutional analysis, even while

conscientious school district, therefore, is left subject to attack from both sides. Having to defend a sound policy against legal challenges, simply because the law is unclear, results in diversion of public money from educational purposes to litigation expenses.

II. A U.S. Supreme Court decision is needed to establish specific ground rules for considering race in the special context of student assignment in K-12 schools.

This Court and other federal courts have long recognized the special context that exists within public schools and the associated need for a different civil rights framework within the K-12 setting.[8] Special constitutional rules have been applied in the public K-12 setting under the First Amendment,[9] the Fourth

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courts invoke strict scrutiny as the proper lens. Assuming, *arguendo*, that strict scrutiny should apply in this circumstance, the two-part analysis requires courts to determine whether the public school district has a compelling state interest for initiating and continuing a program that considers race and whether the approach is narrowly tailored to achieve that interest. Courts have refrained from conclusions about whether the use of race is a compelling state interest – citing the lack of U.S. Supreme Court guidance – but have nonetheless gone on to strike down programs for not being narrowly tailored enough, regardless of how that interest is defined or explained.

[8] *See Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) ("A school need not tolerate student speech that is inconsistent with its 'basic educational mission,'" even though the government could not censor similar speech outside the school); *see also Tinker v. Des Moines School Dist.*, 393 U.S. 503, 506 (1969); *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 868 (1982) ("Of course all First Amendment rights accorded to students must be construed "in light of the special characteristics of the school environment.").

[9] In *Tinker*, 393 U.S. at 506 (1969), the Court focused on the need for balancing between free speech rights available generally in society and the special K-12 context: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.... Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the

Amendment,[10] the Fifth Amendment,[11] the Eighth Amendment,[12] and the Thirteenth Amendment.[13]

As stated by this Court, an education "is required in the performance of our most basic public responsibilities. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values." *Brown*, 347 U.S. at 493. It is an accepted role of the public schools to prepare America's children to participate in our democracy. This Court should consider the need for using race to protect diversity in light of public schools' unique mission of preparing students for effective citizenship in the future.

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school authorities." *See also, Bethel School District No. 403*, 478 U.S. at 682 (finding that vulgarity is not protected in the K-12 classroom, the Court declared that the First Amendment rights of students in public schools "are not automatically coextensive with the rights of adults in other settings"); and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (finding that, in light of the special context and pedagogical concerns of the school environment, school administrators have greater latitude than government generally to curtail the First Amendment free press rights of K-12 student newspapers).

[10] *E.g., New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) ("It is evident that the school setting requires some easing of the [Fourth Amendment] restrictions to which searches by public authorities are ordinarily subject.") .

[11] *See Goss v. Lopez*, 419 U.S. 565 (1975) (applying the due process clause); *Bills v. Homer Consolidated Sch. Dist. No. 33-C*, 967 F.Supp. 1063 (N.D. Ill. 1997) (applying the self-incrimination clause).

[12] *Ingraham v. Wright*, 430 U.S. 651 (1977) (refusing to apply the Eighth Amendment prohibition against cruel and unusual punishment to corporal punishment in the K-12 setting).

[13] *Herndon v. Chapel Hill-Carboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996) (rebuffing a claim that a high school graduation requirement for students to perform fifty hours of community service violates the Thirteenth Amendment ban on involuntary servitude). *See also United States v. Kozminski*, 487 U.S. 931 (1988); and *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 998, 1000 (3d Cir.), *cert. denied*, 510 U.S. 824 (1993).

While the Court has voiced misgivings about allowing the government to weigh race in other settings, the special context of K-12 public education raises issues that warrant review by this Court. Constitutional rules do not exist in a vacuum. Rather, the need for enforcement of individual rights is balanced against the asserted state interest. This Court, in its analysis, should consider the unique mission of public schools. In this instance, a careful analysis would conclude that the protection of a racially diverse learning environment and avoidance of the harms of racial isolation are so essential to the successful academic education of all children that leaders may take intentional steps to achieve both goals.

It is appropriate, then for this Court to have a different standard in judging the use of race in student assignment. If educators are forbidden to take intentional steps, it is likely that the educational deficits of racial isolation or resegregation will occur in quick fashion. [14]

III. A U.S. Supreme Court decision is needed to reinforce educators' discretion to establish sound policy.

Board members are the locally, democratically elected decisionmakers in local school districts.[15] The approximately 95,000 local school board members nationwide have been selected to make educational policy decisions that they as community

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[14] A good example of what happens when school officials exclude diversity or racial isolation from deliberations is Lowell High School, a coveted magnet school in San Francisco, California. Under the new admissions policy – which may take special account of the applicant's economic background but not his or her race – the number of African-American eighth graders accepted dropped from 5.6 percent to 2 percent; and the percentage of Latino students fell from 11.4 percent to 5.4 percent. Peter Schrag, *The Diversity Defense*, THE AMERICAN PROSPECT, September 1, 1999 at 57.

[15] Note that in some jurisdictions school board members are appointed; commonly though, even those appointments are made by democratically elected political officials.

representatives believe will best serve the children entrusted to their care.[16]

Courts intercede in academic policymaking only when there is a clear constitutional need. This judicial deference has been repeatedly set forth by this Court:

- "In this case, the Court must determine whether the Establishment Clause was violated in the special context of the public elementary and secondary school system. States and local school boards are generally afforded considerable discretion in operating public schools." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (BRENNAN, J., concurring in judgment).
- "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).
- "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities." *Goss v. Lopez*, 419 U.S. 565, 578 (1975).

  "This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." See, e.g. *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 208 (1982); *Wood v. Strickland*, 420 U.S. 308, 326 (1975).
- "Except as last-resort refuges for the protection of constitutional rights, courts should not attempt to function as super school boards..." *Richmond Welfare Rights Organization v. Snodgrass*, 525 F.2d 197, 207 (9th Cir. 1975),

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[16] Policy decisions are based on educational judgments about what children need to succeed academically, economically, socially and as citizens.

citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1.

- "To what extent, and at what points in the curriculum, religious materials should be cited are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools. They are experts in such matters, and we are not" *School Dist. of Abington Township. v. Schempp*, 374 U.S. 203, 300 (1983), (BRENNAN, J., concurring in judgment), quoting in part, *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 237 (1948).

The public school curriculum goes beyond merely the traditional academic goals of reading, writing, and arithmetic.[17] Our communities depend upon the leaders of K-12 to do much more to fully accomplish their mission.[18] A complete education is holistic, addressing the child's development in areas of social skills, workplace skills, and critical thinking, nurturing a youngster's ability to grow in all respects.

To respond to changing times and the changing demands of success, schools have adapted their methodologies and content over the years. What might have seemed radical at its inception

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[17] "The quality of education is reflected not only in the subjects taught and achievement levels reached but also in the learning environment of schools. ... A school's learning environment is enhanced by ... diversity in the backgrounds of the student body." U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1998* at 130.

[18] Disdaining a comparison to *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 912 (1978), the district court below in *Eisenberg* wrote that, " ...it must be remembered that *Bakke* dealt with admissions to medical school. The present case deals with transfers between first grade classes. It is obviously unlikely that first graders will have extensive resumes which may be weighed and considered in addition to their race in the District's formulation of how to craft diverse classrooms. Notwithstanding the lack of classroom experience and other distinguishing credentials of these students, however, the need for a diverse classroom is equal, if not greater, than in later years." *Eisenberg v. Montgomery County Public Schools*, No. AW 98-2797 (S.D. Md. 1998) Petition for a Writ of *Certiorari* at Appendix 29a.

(physical education, art, music, sex education, breakfast or after-school programs) has gradually become part of the norm as local educators in each district recognize the wisdom of incorporating these elements into their educational program as the minimum necessary to prepare students for the future.

Census data confirm that the fabric of the U.S. population in this century will be woven from racially diverse strands. For example, the student-aged Latino population has grown rapidly in the last 30 years, increasing by 218 percent from 1968 until today. Projections show that by 2050, more than one quarter of all school-aged children will be the children of immigrants. The Caucasian population will drop from 73 percent in 1997 to approximately 53 percent in 2050.[19] Diversity is reflected in all kinds of communities in this nation. It is especially present in urban settings, where the 100 largest school districts teach 38 percent of the 17.6 million minority public school students.[20] However, diversity in our population is not limited to our urban centers. In Fargo, North Dakota, one-third of the students at Madison Elementary School were enrolled in English as a Second Language classes in the 1998-99 school year. In a school with 265 students, more than a dozen different languages were spoken.[21]

Clearly, we are becoming an increasingly diverse society. Our public schools recognize this and are adapting their academic and policy decisions accordingly.[22] To do otherwise would be

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[19] U.S. Census Bureau, *Population Projections of the United States by Age, Sex, Race, and Hispanic Origin: 1995 to 2050, reprinted in* U.S. Department of Commerce, Minority Business Development Agency, "The Emerging Minority Marketplace" (1999).

[20] Beth A. Young, U.S. Department of Education, *Characteristics of the 100 Largest Public Elementary and Secondary School Districts in the United States: 1997-98*, EDUCATION STATISTICS QUARTERLY, Fall 1999, *available at* http://nces.ed.gov/pubs99/quarterlyfall99/3-Elem/3-esq13-c.html.

[21] U.S. Department of Education Secretary Richard Riley on the occasion of the 45th Anniversary of *Brown v. Board of Education*, May 17, 1999.

[22] In addition to the single-race children traditionally referred to and counted by the government, there are an increasing number of children of

shirking their responsibility and failing in their mission to prepare children for the future. "School authorities have wide discretion in formulating school policy. ... As a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." *Swann*, 402 U.S. at 17.

IV. A U.S. Supreme Court decision is needed to affirm that local school boards can enact policies to ensure the educational benefits of diverse learning environments.

The Court has an important opportunity in this case to recognize local school board discretion to seek student diversity and to avoid racial isolation as part of overall educational goals. The underpinning of a diversity approach is educational, wherein officials purposefully seek to achieve the many practical benefits gained by a diverse environment.

The Fourth Circuit gave no attention whatsoever to the positive attributes of diversity, the views of local educators or diversity as a positive academic strategy. The educational need for diversity springs from a different genesis than traditional desegregation activities or those steps designed to avoid the historic harms of racial isolation. Diversity as an educational strategy in the school setting yields benefits for all children.

Providing a diverse educational program results in no loss of opportunity as characterized by the Fourth Circuit Court of Appeals below.[23] In fact, neither Jacob Eisenberg, nor any other student, has an unfettered right to any specific educational program offered by public schools. The board of education has the authority to establish policies governing curriculum, programs offered, location, and enrollment. The Fourth Circuit's decision

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dual or multiracial heritage due to a rise in interracial couples. Recognizing this population shift, the 2000 Census will, for the first time in collecting racial statistics, permit individuals to choose all racial categories that apply.

[23] "The facts also appear all too familiar – a child has been denied access to a state-funded educational opportunity because of the color of his skin." *Montgomery County Public Schools v. Eisenberg*, 197 F.3d 123 (4th Cir. 1999). (*See* Petition for a Writ of *Certiorari* at Appendix 9a).

focuses primarily on the school district's refusal to accommodate a personal preference. If equivalent academic opportunities exist – which they do in both buildings (see Petition at 9, n.18) – then the board is simply establishing conditions for one educational program (diversity) based upon its educational vision.

Educators who conclude that learning in a diverse academic environment prepares our children for their future are not engaged in "social engineering", but are acting on the basis of sound educational research[24] – and their conclusion that positive academic results will occur.

1. Increases Academic Achievement

Diversity spurs academic achievement for all students.[25] Among the positive educational benefits of diversity is an increase in college graduation, income, and employment patterns for minority children.[26] Studies have found, *inter alia*, that students

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[24] "... there is substantial empirical evidence that racial diversity in elementary/secondary schools advances important policy goals – by increasing racial tolerance, breaking down barriers to minority achievement, and improving educational outcomes for all students." National Education Association, *The Benefits of A Racially-Diverse Student Body In Elementary/Secondary Education*, (1999), available at http://www.nea.org/publiced/racially.html.

[25] "It is important to note that, in addition to positive effects on intergroup relations, cooperative-learning methods have had positive effects on students of different ethnicities and backgrounds." Robert E. Slavin, *Cooperative Learning and Intergroup Relations*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION, 628, 632 (James A. Banks, ed. 1995).

[26] Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, HANDBOOK ON RESEARCH ON MULTICULTURAL EDUCATION (James A. Banks, ed., 1995); *see also* Robert L. Crain and Rita E. Mahard, *Minority Achievement: Policy Implications of Research*, EFFECTIVE SCHOOL DESEGREGATION: EQUITY, QUALITY AND FEASIBILITY (Willis D. Hawley, ed., 1981).

who were educated in a diverse learning environment were more likely to attend and graduate from college and to work in professional positions than students who were not.[27]

2. Improves Future Workforce

Diversity also serves the interests of employers.[28] Research indicates that students who had a diverse school experience are better prepared for public service occupations such as teaching and police work, where they are called on to serve a diverse citizenry. Business executives have also found that integrated workplaces are often more productive, enhance organizational flexibility and lead to an expansion of markets.[29]

Research also has shown that a diverse educational environment provides long-term career advantages. For example, it leads to reduced racial stereotyping, diminished fears of hostile

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[27] James M. McPartland and Jomills H. Braddock II, *Going to College and Getting a Good Job: The Impact of Desegregation*, EFFECTIVE SCHOOL DESEGREGATION (Willis D. Hawley, ed., 1981). *See also* Robert L. Crain and Jack Strauss, DESEGREGATION AND BLACK OCCUPATIONAL ATTAINMENTS: RESULTS FROM A LONG-TERM EXPERIMENT, (1985); and *The Role of Social Science in School Desegregation Efforts: The St. Louis Example*, 66 JOURNAL OF NEGRO EDUCATION 195 (1997).

[28] "Diverse teams that actually utilized the variety of perspectives present outperformed the homogeneous teams... Thus the major implication for managers from the current study is that whereas increasing diversity in work teams is inevitable due to demographic trends, there are also potential competitive advantages to be gained through tangible effects on team performance." Poppy Lauretta McLeod, Sharon Alisa Lobel, Taylor H. Cox, Jr., *Ethnic Diversity and Creativity in Small Groups*, SMALL GROUP RESEARCH, Vol. 27, No. 2, May 1996, at 248, 260-261. Based on research involving a brainstorming task in which participants were separated into an ethnically diverse group (black, Asian, Hispanic, white) and an all-anglo group and asked to develop ideas and engage in problem-solving).

[29] *Compelling Interest: Examining the Evidence of Racial Dynamics in Higher Education, A Report of the AERA Panel on Racial Dynamics in Colleges and Universities* (Mitchell Chang, *et al.*, eds., 1999).

interactions and better acceptance of racially mixed occupational settings among both African Americans and Whites.[30]

3. Promotes Tolerance

A diverse learning environment develops skills vital to student success as productive, effective citizens in a 21st century world.[31] On the occasion of the 45th anniversary of *Brown v. Board of Education*, Richard Riley, Secretary, U.S. Department of Education spoke of the significant impact of diversity in public schools.

> "Since *Brown* there has been a wealth of new evidence confirming the important role schools play in the healthy development of children. It is our schools that must reaffirm – both by lesson and by example – the moral correctness of equality. ... We need to focus on issues that go beyond basic challenges to equality and involve more complex questions of perception and trust, which go to the very heart of how we live, work and interact with each other."[32]

Research on the impact of diversity has found that it is better for school districts to take intentional steps to foster

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[30] W.T. Trent, *Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African Americans, Whites and Hispanics*, 31(2) INT'L JOURNAL OF CONTEMPORARY SOCIOLOGY 273 (1994); and Janet W. Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, in HANDBOOK ON RESEARCH ON MULTICULTURAL EDUCATION (James A. Banks, ed. 1995).

[31] As the district court noted in *Wessmann v. Boston Sch. Comm.*, 996 F.Supp. 120, 128 (D. Mass. 1998): "Public secondary schools are of singular importance in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." Petitioner's Brief, Appendix 26a.

[32] 45th Anniversary Speech, *supra*, n. 21.

exposure to children of all races, ethnicities and nationalities. These efforts send a strong message to children.

> "[T]he fact is that social learning occurs whether it is planned or not. Hence, an interracial school cannot choose to have no effect on intergroup relations. It can only choose whether the effect will be planned or unplanned. Even a *laissez-faire* policy concerning group relations conveys a message – the message that either school authorities see no serious problem with relations as they have developed or they do not feel that the nature of intergroup relations is a legitimate concern for an educational institution."[33]

Wade Smith wrote that "[t]olerance evolves, like culture or language. Our regard for others is rarely immutable; and it often depends as much on the milieu in which our attitudes develop, as on the particular outgroup in question."[34] In a 1997 study, Jennifer Hochschild took it a step further finding that, "[r]acial separatism is neither ... a viable option for most African Americans nor an attractive one for most whites. At best, it is unstable and personally constricting; at worst, it is a recipe for increased tension, hatred, and eventual violence."[35]

Distilled to its essence, schools teach students the life interaction skills they need to succeed. Districts, by adopting

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[33] Janet Ward Schofield and H. Andrew Sagar, *Desegregation, School Practices and Student Race Relations*, in THE CONSEQUENCES OF SCHOOL DESEGREGATION 59 (Christine H. Rossell et al. eds., Temple University Press,1983); *see also* Amy S. Wellans and Robert Crain, STEPPING OVER THE COLOR LINE: AFRICAN-AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS (1998).

[34] *Cohorts, Education, and the Evolution of Tolerance*, 14 SOCIAL SCIENCE RESEARCH 205, 205-225 (1985).

[35] Jennifer Hochschild, *Is School Desegregation Still a Viable Policy Option?*, POLITICAL SCIENCE & POLITICS (1997).

diversity policies, are providing youngsters with vital first-hand lessons in a protected, structured environment.[36]

CONCLUSION

Diversity in K-12 schools serves the purposes of promoting citizenship and harmony among people of different backgrounds and experiences, a notion that has been a continuing challenge since the Declaration of Independence – and without which the United States cannot continue to succeed as a democracy.[37] Promoting diversity as an educational benefit is in line with the historic mission of public schools and the ideals of Thomas Jefferson and Horace Mann. *E pluribus unum* – from many, one – this phrase has been a long-term goal of public education. Through their formative schooling years the many peoples of the United States come to learn that our commonalities outweigh our differences and that our destinies are all intertwined.[38]

Educators are hoping this Court will allow them the discretion to formulate an answer to this perplexing educational question. As the new century unfolds and the technological age speeds us along, the role of education will increase. The use of distance education will increase, but the most effective learning will still occur in face-to-face settings. As such, schools should be

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[36] *Brown*, 347 U.S. at 493 (Identifying education as "perhaps the most important function of state and local governments. It is required in the performance of our most basic public responsibilities. ... It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values...") .

[37] *Ambach v. Norwich*, 441 U.S. 68, 76 (1979)(Speaking of the "singular importance" of public elementary and secondary schools "in preparation of individuals as citizens and in the preservation of values on which our society rests").

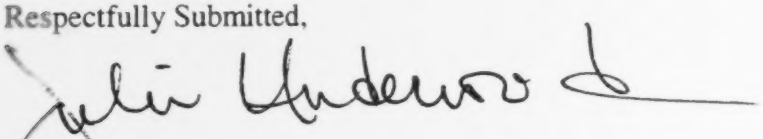
[38] *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. at 681 ("[one] of the objectives of public education is the inculcation of fundamental values necessary to the maintenance of a democratic political system.").

able to establish a learning environment which includes people of many different races, backgrounds, languages and ethnicities.[39]

Amici urge this Court to recognize again the special mission of K-12 education and the authority of local school officials to make decisions regarding academic programs that will prepare children for America's future. Many school districts around the nation have concluded that separate is academically deficient. A Supreme Court decision in this case is needed to affirm their authority to act on that conclusion. If this Court affirms that racial diversity is a constitutionally permissible, compelling educational interest, it would allow narrowly tailored plans, such as the one constructed by Montgomery County (Md.) Public Schools, to withstand challenge and thus achieve compelling its educational objectives.

Amici request that this Court grant *certiorari* to define the legal parameters in the use of race and student assignment, providing school districts clear guidance.

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[39] "A priority objective of local, state, and federal education leaders and policymakers should be equal representation of African Americans, Latinos, and Native Americans among the most academically successful students, and policies should be evaluated against this goal." *Reaching the Top: A Report of the National Task Force on Minority Achievement*, p. 32, The College Board (1999).

Supreme Court, U.S.
FILED
FEB 22 2000
CLERK

(4)

No. 99-1069

IN THE

Supreme Court of the United States

THE MONTGOMERY COUNTY PUBLIC SCHOOLS AND MEMBERS OF THE MONTGOMERY COUNTY BOARD OF EDUCATION,

Petitioners,

v.

JEFFREY EISENBERG AND ELINOR MERBERG, ON BEHALF OF JACOB EISENBERG,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY IN SUPPORT OF PETITION

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CONSTITUTION:

U.S. Const. amend. XIV, § 1 9

IN THE

Supreme Court of the United States

NO. 99-1069

THE MONTGOMERY COUNTY PUBLIC SCHOOLS AND MEMBERS OF THE MONTGOMERY COUNTY BOARD OF EDUCATION,

Petitioners,

v.

JEFFREY EISENBERG AND ELINOR MERBERG, ON BEHALF OF JACOB EISENBERG,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY IN SUPPORT OF PETITION

Respondents begin the Brief in Opposition ("Opp.") by conceding that the decision below will prompt school districts throughout the Nation to re-examine their race-conscious student assignment policies. Respondents draw the right conclusion concerning the practical effect of the decision below but, by arguing that the Petition should be denied to give school districts an incentive "to devise lawful policies" to achieve the goal of racial diversity in public schools, Opp. at 1, they propose the wrong response from this Court. Because the decision below so sweepingly rejects the voluntary efforts of school districts to avoid racial segregation, if it is allowed to stand school districts within

the Fourth Circuit will have to change race-sensitive student assignment policies and school districts elsewhere will be chilled in their efforts to provide the benefits of racial diversity in assignments for their students. The decision below is having this potent effect although it is based on a rule of law that conflicts with decisions of this Court and of other courts of appeals. This confusion will be relieved not by *denial of* the Petition, but only by plenary consideration of this case by this Court.

1. Ever since the decision in *Hopwood* v. *Texas*, 78 F.3d 932 (5th Cir.), *reh'g en banc denied*, 84 F.3d 720 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), local school officials have struggled with whether they may take race-conscious actions necessary to avoid creating racially isolated schools. While this Court's cases hold that race-conscious actions by governmental actors are not unlawful *per se*, and state that school officials may take voluntary, race-conscious actions in making student assignments, the Fourth Circuit has now, like the Fifth Circuit in *Hopwood*, devised a bright-line rule, holding below that "racial balancing" is always unconstitutional. App. 19a. In the Fourth Circuit, application of the rule against racial balancing requires no evidentiary record because the particulars of any race-conscious student assignment plan do not matter. As long as race may be outcome-determinative for a single child and the school district is involved in what may be characterized as racial balancing, the Fourth Circuit held in the decision below that the policy cannot stand.

Respondents assert that the Fourth Circuit issued a narrow decision holding the use of "racial bars" unconstitutional. Opp. at 1. The Fourth Circuit's opinion, however, nowhere mentions racial bars; its rule is that "racial balancing" is unconstitutional. App. at 19a.[1] Semantics aside,

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[1] Characterizing the MCPS transfer policy as one that imposes "racial bars" is misleading. While a student's race is outcome-determinative in some cases, there is no racial bar that prevents all students of a particular race from transferring into or out of any MCPS school. The transfer policy's personal hardship exception

neither the respondents' "racial bar" rule nor the Fourth Circuit's "racial balancing" rule are supported by this Court's cases, which eschew *per se* rules and require a case-by-case analysis of race-conscious governmental action, using strict scrutiny.

Respondents rely heavily on Justice Powell's opinion in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), and no doubt couch the decision below in terms of a "racial bar" to make this case sound more like the plurality opinion in *Bakke*. But Justice Powell's opinion in *Bakke* does not impose a *per se* rule against "racial bars" in student admissions policies.[2] In *Bakke*, Justice Powell stated that "when a State's distribution of benefits . . . hinges on . . . the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest." 438 U.S. at 320. As most recently refined, strict scrutiny analysis is what this Court has called for in such cases.

Strict scrutiny "evaluates carefully all governmental race-based decisions *in order to decide* which are constitutionally objectionable and which are not. By requiring strict scrutiny of racial classifications, we require courts to make sure that a governmental classification based on race . . . is legitimate, *before permitting unequal treatment based on race* to proceed." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200,

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allowed five white students to transfer out of Glen Haven, Jacob Eisenberg's neighborhood school, in 1998-99. App. 7a & n.10. Indeed, respondents were offered a transfer from Glen Haven, to a foreign language program, that they declined. Pet. at 9.

[2] Nor do any of the decisions relied on by respondents refer to "racial bars" or hold that any particular use of race is *per se* unconstitutional. Respondents' argument that a line of cases from *Bakke* to *Wessmann* v. *Gittens*, 160 F.3d 790 (1st Cir. 1998), forbids "racial bars" is simply wrong. Respondents recognize that *Wessmann* itself, based on a full trial record, paid "'particularized attention' to the facts supporting the need for diversity." Opp. at 6 (quoting *Wessmann*, 160 F.3d at 798). The Fourth Circuit's rule against racial balancing foreclosed that process here.

228 (1995) (first emphasis in original, second emphasis added). *Adarand* thus expressly contemplates that some race-conscious programs that burden an individual based on race will survive strict scrutiny.

The decision below jumps to a conclusion of illegality without the careful analysis required by strict scrutiny under *Adarand*. That rush to judgment is betrayed by the Fourth Circuit's lack of a basis in a developed factual record reflecting such fundamental information as the number of students denied transfers under the policy and what racial isolation MCPS would create by abandoning consideration of race in student transfers.[3] The Fourth Circuit bypassed a factual record because the scrutiny it applied was not a principled exercise of "distinguish[ing] legitimate from illegitimate uses of race," *Adarand*, 515 U.S. 228, but rather served as a means of concluding that any use of race is unconstitutional. In the Fourth Circuit, application of strict scrutiny is indeed "fatal in fact," contrary to this Court's assurances in *Adarand*. *Id.* at 237 (citation omitted).

In contrast, the Ninth Circuit and the Second Circuit have approved race-conscious student assignment policies after careful scrutiny on a full factual record. *See* Pet. at 20-22; *Hunter ex rel. Brandt* v. *Regents of Univ. of Cal.*, 190 F.3d 1061 (9th Cir. 1999), *petition for reh'g pending; Parents Ass'n of Andrew Jackson High Sch.* v. *Ambach*, 738 F.2d 574 (2d Cir. 1984). And in *Wessmann* v. *Gittens*, 160 F.3d 790 (1st Cir. 1998), the First Circuit, unlike the Fourth Circuit, applied its narrow tailoring analysis to a record developed after a full trial. The Fourth Circuit's *per se* approach cannot

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[3] While the record below does not disclose the effect district-wide on removing race as a factor in the MCPS transfer policy (because respondents did not challenge the district-wide policy in the preliminary injunction motion), it does show that at Glen Haven, Jacob Eisenberg's neighborhood school, a total of 19 white children – approximately 14% of that population – would have transferred from Glen Haven for 1998-99 in the absence of a race-conscious policy. App. 7a n.10; J.A. 55.

be reconciled with the careful analysis undertaken by these other courts of appeals.

2. Respondents urge this Court to bypass this case and await "the most important constitutional issue in this area of the law: whether diversity could ever be a compelling interest for equal protection purposes." Opp. at 17-18. Respondents' plea is telling. They urged the courts below to hold as a matter of law that no interest other than a strictly remedial purpose can ever be sufficiently compelling under strict scrutiny to warrant upholding a student assignment plan that considers race. App. 25a. They concede now that this issue is important. Opp. at 17-18. An honest look at the Fourth Circuit's decision here – and other cases decided recently by the lower courts – reveals that rulings rejecting race-sensitive policies on narrow tailoring grounds are achieving the same objectives that respondents urged as a matter of law on the compelling state interest prong of the strict scrutiny test. As a result, a case raising the "compelling state interest" issue may never reach this Court.

The Fourth Circuit avoided the compelling state interest issue by "assuming" that MCPS had a compelling interest. App. 13a. The court then performed its narrow tailoring analysis on a record that was compiled in one week's time to address only a motion for preliminary injunction. The motion did not encompass the operation or effect of the transfer policy district-wide, but only concerned where a single child would begin first grade, yet the Fourth Circuit concluded that no further fact-finding was necessary to support a permanent injunction against district-wide application of the policy. App. 20a. Respondents attempt to defend the Fourth Circuit's result using facts that were not before that court, Opp. at 3 n.3, and to explain away erroneous "facts" found by that court, Opp. at 14 n.12, but they do not even attempt a comprehensive justification of the Fourth Circuit's method of conducting the narrow tailoring analysis.

The decision below is not alone in end-running the compelling state interest prong of the strict scrutiny test and invalidating a policy on the basis of narrow tailoring, almost

without regard to the state of the factual record. In *Tuttle* v. *Arlington County Public Schools*, 195 F.3d 698 (4th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3497 (Jan. 31, 2000) (No. 99-1274), the Fourth Circuit applied its racial balancing rule to strike down a race-conscious student assignment policy that in its particulars was quite different from the MCPS transfer policy. In *Tuttle*, like the decision below, the court assumed the compelling nature of the school district's interest and then made its own factual findings to conduct a narrow tailoring analysis and find the policy unconstitutional. *Id.* at 705-07. In *Tuttle*, no record was compiled in the district court on the issue of narrow tailoring or compelling state interest because the district court consolidated a motion for a preliminary injunction with that for a permanent injunction and refused the school board's request to be allowed to make any evidentiary record. *Id.* at 702.

Since the Petition was filed in this case, a district court, citing the Fourth Circuit's decision below, has followed the same procedure to strike down a race-conscious student assignment policy. In *Scott* v. *Pasadena Unified Sch. Dist.*, No. CV 99-1323 (C.D. Cal. Feb. 8, 2000), the court assumed the compelling nature of the school district's interest in a race-conscious student assignment policy for a magnet school program, but granted summary judgment against the school district on the issue of narrow tailoring. It was immaterial to the district court that the race-conscious element of the admissions policy had never been put into practice by the school district. The court in *Scott*, like the Fourth Circuit below and in *Tuttle*, purported to apply strict scrutiny and to find fault with narrow tailoring. In reality, the decision below is leading the way to the use of *per se* rules in the narrow tailoring analysis in which the particular facts simply do not matter.

3. Permitting this case to stand would lead to inappropriate limits on the local autonomy of public school districts, as respondents suggest when they propose that "[i]ntegration can only be pursued as a result of a constitutional violation, not for its own sake." Opp. at 12. That stunning assertion finds no support in this Court's cases. This Court has stated

repeatedly that school officials may take race into account in devising student assignment policies to increase integration in public schools.[4] Respondents attempt to distinguish *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43 (1971), *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), and *Bustop, Inc.* v. *Board of Educ. of City of Los Angeles*, 439 U.S. 1380 (Rehnquist, Circuit Justice 1978), Opp. at 7-8, but never dispute that in each of those cases the Court recognized the inherent authority of school districts to take race-conscious measures in assigning students to public schools. *See* Pet. at 15-19.[5]

Respondents confuse the cases addressing the power of *federal courts* to remedy constitutional violations involving segregated schools, and law concerning the autonomy of *school officials* to exercise their educational judgment in reducing racial isolation and creating diversity in student assignments. In *Freeman* v. *Pitts*, 503 U.S. 467 (1992), this Court addressed the showing that was necessary for a school district to be released from a mandatory federal court desegregation order. *Freeman* does not address the actions that may be taken voluntarily by a school district not under court order to desegregate, where district officials have determined, in their educational judgment, that a race-conscious

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[4] Respondents' assertion that Congress has greater power than do local school boards to decide where children should go to school turns federalism on its head. Opp. at 9-10 n.7. Moreover, while respondents rely on *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), to support the notion that the federal government has greater latitude here than do state and local governments, that notion was put to rest in *Adarand*. 515 U.S. at 227.

[5] Respondents' emphasis of other points made by the Court in *Washington* v. *Seattle School District No. 1*, 458 U.S. 457 (1982), fails to obscure the fact that *Seattle* makes no sense unless it is based on the principle that school officials generally have the authority to take race-conscious measures – in that case mandatory busing – in assigning students to schools. This Court in *Seattle* would not have struck down as unconstitutional a state law prohibiting such student assignments if those assignments violated the Fourteenth Amendment.

policy is necessary to avoid the educational harms associated with racially isolated schools. In *Freeman* this Court simply found that the school district "had no *duty* to achieve system-wide racial balance in the student population." 503 U.S. at 496 (emphasis added). To say that a school district has no duty to obtain any set level of integration, however, is not the same as saying that the Constitution forbids a school district from taking steps, even race-conscious ones, to avoid creating racial isolated schools or to provide more diverse student enrollments.

4. The National School Boards Association and sixteen other groups of professional educators from across the Nation have filed an *amicus curiae* brief in support of the Petition ("NSBA Brief") to underscore that it is important to the elected and appointed school officials who make daily decisions about the best way to educate children that the Court address this issue. As the Petition explains and *amici* emphasize, this Court has recognized over and over again the importance of allowing locally elected or appointed school officials autonomy to control the education of the children they serve. NSBA Br. at 10-11. No responsibility of these local officials is more basic than deciding where children will attend school.

Conscientious school officials who seek to comply with the law currently find themselves facing the prospect of litigation no matter what they do regarding the use of race in student assignment. This area is bound to be delicate as school officials balance constitutional duties that "are not always harmonious." *Wygant* v. *Jackson Bd. of Educ.* 476 U.S. 267, 277 (1986). The decision below, however – by adopting bright-line rules instead of applying strict scrutiny as called for by this Court – leaves school officials insufficient room in which to operate without facing a discrimination lawsuit. Respondents recognize this when they dismiss the prospect of litigation against MCPS for creating racially isolated schools as "an issue for a different lawsuit." Opp. at 15 n.14. Here again, respondents agree with MCPS about the likely effect of the decision below, but propose the wrong solution. That MCPS may face litigation by operating its

transfer policy without regard to race is a reason to grant the Petition, not to deny it.[6]

The issues raised by the Petition are important and are spawning litigation all across the country. These cases are being decided using varying interpretations of this Court's precedents under the Equal Protection Clause. Until this Court steps in, the unsettled nature of the law will support the rising tide of litigation against school districts which is diverting resources from the educational needs of our Nation's children. The Petition squarely presents the issues of whether school districts may take voluntary race-conscious actions in student assignments to avoid creating racially isolated schools and whether a court of appeals may make that determination in the absence of a factual record in the district court. This Court should grant the Petition to end the uncertainty so that school districts and lower courts will know the parameters of the law governing voluntary race-conscious admissions policies.

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[6] Respondent further suggests that the decision below poses no problem because MCPS can simply forbid any student transfers. Opp. at 16. This assertion, however, accords too little weight to the educational judgment made by MCPS that providing parents with some measure of school choice improves the education of MCPS students. In addition, as the Petition explains, state and federal law make certain student transfers unavoidable. Pet. at 28.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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February 22, 2000